**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Suit 973 of 2004**

**REUBEN GITONGA M' MUGAMBI…………………………PLAINTIFF**

**VERSUS**

**KENYATTA NATIONAL HOSPITAL ………...……………...DEFENDANT**

**RULING**

The defendant/applicant has moved to this court, by way of a chamber summons dated 30th day of June 2008 and filed the same date. It is brought under order IXA rule 10 and 11 of the CPR, section 3A of the CPA and all other enabling provisions of the law. It seeks 2 prayers:-

*1. "That the ex-parte interlocutory judgement herein entered against the defendant/applicant on 20th January 2008 in default of defence be set aside together with all consequential orders.*

*2. That cost of this application be in the cause."*

The background information to the application is that the suit herein was initiated by the plaintiff/respondent filing a plaint dated 16th September 2004, and filed on the 17th day of September 2004, simultaneously with an interim application also dated 16th day of September 2004 and filed the same 17th September 2007. Which application had sought 4 prayers namely:-

*1. "That the application herein be certified as a urgent and be heard in priority basis.*

*2. That the Respondent be compelled to re-open the Business premises of the applicant.*

*3. That the Defendant be restrained from closing and or interfering with the plaintiff Business premises.*

*4. That cost of this application be provided for in the cause".*

The said application had been brought under order XXXIX rule 1 and 2 (9) of the CPR, section 3A of the CPA.

(a) The defendant who was a respondent to that application filed a preliminary objection dated 24tth September 2004 and filed the same date, raising three (3) objections namely:-

*1. That the provision of order L rule 16 (i) have not been complied with.*

*2. That this court, has no jurisdiction under the landlord and tenant (shops, Hotels and catering establishment) Act cap 301 laws of Kenya, to hear and determine the plaintiff/applicants application dated 16th September 2004.*

*3. That there is no priority of contract between the plaintiff/applicant and the defendant/Respondent.*

The said processes gave rise to a ruling delivered by Ojwang J on the 4th day of February 2005 who made the following findings:-

***(a).*** *The plaintiff has a genuine business premises.*

***(b).*** *The defendant had let its premises so that it may be used as business premises to the Kenya police a department in the office of the president.*

***(c).*** *The plaintiff did hold a valid tenancy, a protected tenancy with the Kenya Police over the suit premises which is the property of an independent, parastatal corportion which may sue and be sued in its own corporate name.*

***(d).*** *Allegation that the contract between the plaintiff and the Kenya police had expired was disputed, a fact which had to be proved at the trial.*

***(e).*** *The moment disputed issues are thus joined, it ceases as a matter of law to be open to a landlord to unilaterally evict or shut out the tenant as the tenants grievances are thereby rendered absolutely nugatory, which is contrary to the letter and spirit of the law.*

***(f).*** *The circumstances in which the defendant has shut down the plaintiffs premises smack of the sort of high handedness that has the effect of corrupting the proper functioning of the legal process.*

***(g).*** *It had not been disputed that all the plaintiffs' wares had simply been locked in the suit premises and the plaintiff simply given matching orders.*

***(h).*** *That would be illegal because the plaintiff has constitutional rights to his property which nobody is allowed to confisticates, the plaintiff legitimate economic activities, which ultimately link up to property rights are subject only, in general terms to the laws of contract.*

***(i).*** *The plaintiff has a genuine complaint that by reason of the contractual relationship between them, he was entitled to a proper notice and the action of locking up his Perishable goods is likely to cause him economic loss.*

***(j).*** *By reasons of what has been stated above the defendant was ordered to reopen the premises forth with and in any case not later than within 21 days from the date of the making of the order, keep it open pending either the making of a suitable arrangement between the parties or the hearing and determination of Business premises Rent, Tribunal case No. 360 of 2004 whichever one is accomplished first in time.*

There appears to have been an application presented under certificate of urgency dated 19th day of April 2005 and filed on 20th April 2005 brought under order XLIV rule, order XXXIX rule 4, order XXI rule 23 of the CPR, section 63 (e) and 3A of the CPA, and all other enabling provisions of the law. It sought 4 prayers namely:-

*1. That the application be certified urgent and heard exparte in the first instance.*

*2. That pending hearing and determination of this application, the Honourable court, do order stay of*

*execution of the ruling delivered on 4th February 2005 and the resultant orders.*

*3. That the Honourbale court, be pleased to review its ruling and/or order delivered on 4th February 2005.*

*4. That the costs of this application be in the cause. The record is not very clear as to what become of that application.*

The summons to enter appearance were taken out on the 22nd day of October 2007. There is a R/S sworn by one Noel M.N. Munyithya on the 12th day of November 2007. Paragraph 3 thereof depones that the defendant was served on the same date on 24/10/07 with the summons to enter appearance annexed to the R/S. There is an endorsed copy of summons to enter appearance evidencing service of the same on 24/10/2007 at 10/30 a.m.

Apparently no appearance and defence were filed. This default on their part prompted the filing of a request for judgement dated 12th day of November 2007 and filed on 13th November 2007 made under order IXA rule 6. The content reads:-

"*The plaintiff request interlocutory judgement against the defendant Kenyatta National hospital who has failed to appear within the prescribed time, prescribed by the rules of this Honourable court."* A perusal of the said document reveals that the same was placed before the SPDR on 15/1/08 for direction, who gave directions for the interlocutory judgement to be entered as prayed which interlocutory judgement was endorsed by the Deputy Registrar on the 21st day of January 2008, and there after the matter listed for formal proof. The listing of the matter for formal proof prompted the defendant/applicant to present the application subject of this ruling. It is dated 30th day of June 2008 and filed the same date. It is brought under order IXA rues 10 and 11CPR, section 3A of the CPA, and all other enabling provision, of the law. It seeks 2 prayers namely:-

*1. That the exparte interlocutory judgement herein entered against the defendant/applicant on 20th January 2008 in default of defence be set aside together with all consequential orders.*

*2. That cost of this application be in the cause.*

The grounds in support are set out in the body of the application supporting affidavit, annextures and oral representations as well as case law. The major ones are as follows:-

**(i).** Indeed the plaintiff filed suit in 2004 with an interim application which gave rise to the ruling by justice Ojwang on 4th February 2005 annextures WM1.

**(ii).** In pursuance of directions given by the said learned judge in the said ruling, a lease was duly executed between the parties, annexture MW2.

**(iii).** Upon execution of the said lease, the defendant made several attempts to have the matter negotiated between them and the plaintiff with a view of having the same settled amicably out of court. In pursuance of which various meetings were held between the defendant and the plaintiffs advocates.

**(iv).** That consequent upon the signing of the afore said lease, the plaintiff filed, signed and or neglected to prosecute the reference at the tribunal being BPRT cause number 360 of 2004 which was consequently dismissed for want of prosecution on the 18th day of December 2007.

**(v).** It is their stand that since the matter was referred to the tribunal by this courts' ruling of 4/2/2005 meant, that the tribunal, was the best forum for the resolution of the dispute herein.

**(vi).** It is their stand that failure of the plaintiff to prosecute the said tribunal proceedings was

simply intended to delay the finalization of the matter herein as well as to steal a match against the defendant, and this is an abuse of the due process of the court. More so when the suit was filed on 17/9/04 but summons to enter appearance were taken out and served more than three years later on 22/10/07 and served on 24/10/07.

**(vii).** The plaintiff lured and or enticed the defendant to enter into negotiations for an out of court settlement, only to turn round and attempt to fix the matter for formal proof.

**(viii).** Contend both the request and entry of the said interlocutory judgement was irregular as the defendant had agreed to enter into negotiations to resolve the matter which resolution is yet to be reached.

**(ix).** The reason for failing to enter appearance and file defence in time is because negotiations were going on between the parties. The delay is therefore excusable more so when it is not inordinate.

**(x).** It will be unfair and prejudicial to the defendant if they will be shut out from these proceedings without being heard on their defence, which raises triable issues, in that they contend that the plaintiffs' suit, is an abuse of the due process of the court, and 2ndly that the high court, has no jurisdiction to entertain the dispute herein.

**(xi).** They contend that it is in the interest of justice that the matter herein be re- opened so that both parties are heard on the same on its own merit.

In their skeleton arguments dated and filed the 23rd February 2008, learned counsel reiterated the grounds in the supporting and further supporting affidavit and then stressed the following:-

(b) The relief sought by the plaintiff are:-

(a) General damages

(b) An order, permanently restraining the defendant, by itself, and or its agent and its servants, and or its employees, from interfering with the plaintiffs' gulet possession of his Business premises and comply with the provision of chapter 301.

(c) Costs of this case and interest at court, rates.

(d) Any other relief that this court, deems fit and just to grant.

The reference number 360 of 2004 was filed by the plaintiff at the Business premises rent Tribunal on 16th September 2004, simultaneously with the subject suit and an interim application in the suit. A ruling was given in respect to that interim application. An application to stay those interim orders was marked stood over generally to enable parties negotiate the matter amicably.

(c) They contend the interlocutory judgement entered herein is irregular because order IXA of the CPR which makes provision for entry of default judgement does not permit the entry of judgement as it has happened in this case, since all questions requiring adjudication must be brought for hearing before a judge and not before the Deputy Registrar because:-

**(a).** The Registrars' mandate and jurisdiction is strictly limited to the application of automatic out comes of the play of the court procedures rules.

**(b).** The Deputy Registrar, has no jurisdiction and or power to issue a permanent injunction as prayed in the plaint by the plaintiff/Respondent.

By reasons of what has been stated above, they submit that the action taken by the Deputy Registrar, was improper and irregular, and therefore a basis for setting aside.

-They complied with justice Ojwang's ruling of 4/2/05 by entering into a lease agreement dated 2nd June 2006 with the plaintiff and since then the defendant has not interfered with the plaintiffs' Business premises ever since, signified by the fact that the plaintiff is still carrying on business in the said premises.

-It is their stand that the matter was dismissed by the Business premises tribunal, for want of prosecution and not withdrawn as alleged by the plaintiff in their replying affidavit.

- The court, is urged to accept the applicants reason for the delay in entering appearance and filing defence as being because negotiations had been going on between the parties culminating in the signing of the lease exhibited and it had also been hoped that the matter would be resolved amicably.

- They also contend that they have triable issues in that the defendant cannot be possibly permanently restrained as an owner of the premises from exercising its right to rent/ let or enter into other contracts regarding the said premises or alternatively to prevent the defendant from exercising its constitutional rights over the said properties.

The plaintiff/respondent moved to oppose the application on the basis of grounds set out in the replying and further replying affidavit, as well as written skeleton arguments. These are:-

- In the ruling of 4/2/05 the learned judge ordered the defendants to open the premises forthwith, but this was not complied with until 2nd day of June 2006 a period of 600 days later, after contempt proceedings had been commenced.

- Indeed the plaintiff advocates approached the defendant with a view to settling the matter amicably out of court, but the defendant did not respond to the same.

- That indeed a reference number 360 of 2004 was filed out of the business premises tribunal, but the same was later on withdrawn.

- Denied abusing the due process of the court.

- That he is in possession of the said premises as a result of a court, order made on 4/2/05.

- That the defendant/applicant has not conducted themselves in good faith in relation to the proceedings.

- Deny that any proceedings took place on 18th December 2008 before the tribunal where by the tribunal proceedings was allegedly dismissed for want of prosecution.

In their written skeleton arguments, the learned counsel for the plaintiff/respondent reiterated the content of the replying affidavit the history of the proceedings and then stressed the following:-

- Concede they moved to this court, seeking the aforementioned reliefs.

- Concede they also moved to the Business premises and filed a reference.

- Concede the suit had been simultaneously filed with an interim application via whose ruling the defendant was ordered to open the premises, which they eventually did and there after parties executed a two year lease.

- Concede that after the signing of the lease the parties entered into negotiations as regards damages payable but the negotiations failed.

- That there is no defence to their claim as all that was left for determination is an assessment of

damages payable to the plaintiff.

The defendant referred the court, to case law as well. There is the case of **WAIBOCI AND ANOTHER VERSUS PASHITO HOLDINGS LIMITED AND 7 OTHERS (2004) 2KLR 415.** On an application for setting aside Ojwang J on the 8th October 2005. The learned judge held inter alia that:-

*(i) An entirely Regular interlocutory judgement can be set aside where the Defendant happens to have and places before the court, a reasonable defence on the merits and an assessment of such merits may be made on the basis of the draft defence.*

*(ii) A defendant who seeks the setting aside of an interlocutory judgement because he had been prevented by some cause from filing and serving his papers as required has a dutys to bring before the court an explanation of the circumstances in which such hardship had arisen, and it is for the court, to assess the merits of the request and to apply its discretion as necessary.*

(iii) *A matter which does not entail a claim for pecuniary damages or for detention of goods with or without a claim for pecuniary damages is not a proper one in respect of which the Deputy Registrar can enter interlocutory judgement*.

The case of **EASTERN AND SOUTHERN AFRICAN TRADE AND DEVELOPMENT BANK (the PTA Bank) VERSUS CAPTAIN MUSA HASSAN BUSHAN NAIROBI MILIMANI COMMERCIAL COURT NO. 544 OF 2002 (OS)**, decided by T. Mbaluto judge on the 4th day of February 2003. among others the applicant sought the setting aside of the interlocutory judgement plus all consequential orders which had been entered by reason of failure to file a defence which application was allowed on the ground that no interlocutory judgement can be entered in an originating summons.

The case of **FURSYS (K) LTD VERSUS SYSTEMS INTERGRATED LIMITED T/A SYMPHONY NAIROBI MILIMANI HCCC NO. 1237 OF 2002** decided by Njagi J on the 27th day of April 2004. At page 8 of the ruling line 5 from the bottom there is observation that:

"*In an application to set aside an exparte judgement there are no limits or restrictions on the judges' discretion. The discretion is totally unfettered except that it should be exercised judiciously and that it should be based on such terms as may be just because the main concern of the court, is to do justice to the parties"*

At page 9 of the ruling the learned judge quoted with approval the case of **JESSE KIMANI VERSUS MACCONNEL (1966) EA 547** in which it had been held that some matters to be considered in such applications are the facts and circumstances, both prior and subsequent and all the respective merits of the parties together with any other material factors which appear to have entered into the passing of the judgement which would not or might not have been present had the judgement not been exparte and whether or not it would be just and reasonable to set a side or vary the judgement upon terms to be imposed.

Also quoted with approval was the case of **JAMNADAS SODHIA VERSUS GORDANDAS HEMRAS (1952) 7 ULR11** In which the court, was of the view that, "*the nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered ….. and finally, it should be remembered that to deny the subject a hearing should be the last resort of a court"*

The case of **CRYSTAL MOTTORS (K) LIMITED VERSUS OCCIDENTAL INSURANCE COMPANY LIMITED NAIROBI MILIMANI COMMERCIAL HCCC NO. 91 OF 2007** decided by Warsame J on the 6th day of June 2007, in which an interlocutory judgement though, regular was set aside, because the plaintiff failed to alert the defendant that they would apply for entry of interlocutory judgement upon failure to materialize the negotiations.

The case of **WAWERU VERSUS NDIGA (1983) KLR 238-245**, a court of appeal decision which held inter alia:-

*(i) "Order IXA rule 10 of the CPR empowers the court, to set aside or vary exparte judgement upon such terms as are just and there is no requirement of showing sufficient cause.*

*(ii) In an application under order IXA rule 10 of the CPR*

*(a) The court, has an unfettered discretion to do justice between the parties,*

*(b) It may be just on the facts of the particular case, to avoid hardship or in justice arising from in advertence or mistake even through negligent, but the discretion should not be exercised to assist any one to delay the course of justice*

*(c) The court, of Appeal will not interfere with the judges exercise of discretion unless there has been a misdiscretion leading to a wrong decision or manifestly wrong decision leading to injustice.*

*(d) An application to set aside an exparte judgement made by a defendant may be allowed if the court, is satisfied that the summons to enter appearance were not duly served or that he was presented by any sufficient cause from appearing when the suit was called for hearing"*

The case of **PATEL VERSUS E.A. CARGO HANDLING SERVICES LIMITED (1974) EA 75** where it was held inter alia that:-

*(i) The discretion of the court is not limited"*

On the courts', assessment of the facts herein, it is clear that there is no dispute that the re is in place an interlocutory judgement which the defendant/applicant has moved to this court seeking the intervention of the court. The right to seek the intervention of the court, is anchored on the provisions of order IXA rule 10 and 11 CPR, with rule 11 simply making provision of the mode of procedure, that a litigant needs to use in order to access the relief provided for in rule 10. Rule 10 is the provision of law that Employs the command on setting a side. It simply reads:-

"*Order IXA rule 10:- where a judgement has been entered under this order, the court, may set a side or vary such judgment and any consequential decree or order upon such terms as are just"*

This courts' construction of that rule is that there are three pre-requisites to be met by the litigant namely:-

**(i).** Satisfaction that the judgement complained of had been entered under that provision. The court, finds this satisfied because the request for judgement dated 12th November 2007, and filed on 13th November 2007 was made under order IXA rule 6 CPR.

**(ii).** Satisfaction that the address is made to a court of law. This too has been satisfied in that the application for setting aside has been presented to this court.

**(iii).** The command to the court, is conveyed by the word "May". This court has judicial notice of the fact that construction of the said word by case law that this court, has judicial notice of 15 to the effect that the word denates judicial discretion" This is further supported by the use of the words " as are just"

**(iv).** The action to be undertaken by the court, is to set aside or vary such a judgement.

The yard stick for the exercise of the judicial discretion, donates by the rules is not in built. This has been provided by case law emanating from the court, of appeal and as dutifully followed by the superior court. This established principles provide applicable guidelines. Although this court, has judicial notice of the same and safely apply them here, there is no harm in setting them out in the record. These are:

**(i).** The judicial discretion donated by the rule is not limited.

**(ii).** The court, is enjoined not to fetter itself from the exercise of the said discretion.

**(iii).** The only fetter applicable to the exercise of the said discretion, is that the same has to be exercised judiciously and with a reason.

**(iv).** In relation to setting aside, it meant to be exercised in favour of a party who through in advertence or excusable mistake failed to take a procedural steps leading to the exparte orders being made against the said party.

**(v).** It is never to be exercised in favour of a party who has deliberately sought whether by evasion or otherwise to delay the course of justice.

**(vi).** When determining whether to exercise the same or not, the court, should look at the prevailing immediately before and after the entry of the said interlocutory judgement.

**(vii).** The court, to determine whether the offending judgement fall into the category of regular or irregular judgement.

**(viii).** Where the setting aside of the exparte orders, is being sought with a view to creating an avenue for the other side to be heard, the court, is enjoined to look at the defence being put forward however irregular.

**(ix).** The court, to take note of the guiding principle that denying a party from being heard or as has become to be popularly known, driving a litigant from the seat of justice should be a last resort of any court of law.

These principles have been applied to the rival arguments herein and the court, has made findings to the effect that there is no dispute that indeed summons to enter appearance were taken out and served but the defendant entered in appearance nor filed defence leading to the entry of the said judgement.

The question for determination by this court, is whether the applicant has brought itself within the ingredients warranting this court, to exercise or decline to exercise its discretion. In doing so, the court, has to determine whether this was a regular or irregular judgement. From its judicial notice, this court, is aware that there is now an abundance of case law, on the subject to the effect that a Regular judgement is one which has been properly entered in accordance with the rules, where as an irregular judgement is one which has been entered contrary to the rules. This arise where an interlocutory judgement has been entered in a cause where it is not permisable in law to enter the same as found by Mbaluto J in the case of **EASTERN AND SOUTHERN AFRICAN TRADE AND DEVELOPMENT BANK THE PTA VERSUS CAPTAIN MUSA HASSSAN BULHAN (SUPRA)** in which the learned judge ruled that no interlocutory judgement can be entered in an originating summons.

The foregoing being the case, it is necessary to scrutinize the nature of the claims and then marry it to the provisions of law, dealing with the nature of the claims that are proper candidates for entering of interlocutory judgement. A perusal of the plaint on record reveals that vide paragraph 3, the plaintiff has averred that he is a protected tenant, of a canteen within the defendant's premises, which the defendant unlawfully closed. By reason of the said unlawful closure he filed a reference NO. BPRT 360 (2004) By reason of that, the plaintiffs seek the reliefs specified in the plaint.

It therefore follows that in order to be protected, it has to fall within the ambit of order IXA ruled 6, under which the request for judgement was made. In order for rule 6 to apply, the plaint must be drawn as mentioned in rule 5 CPR. Rule 5 provides inter alia that:-

"*Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages"* This court, has construed this provision and it is of the opinion

that in order for this provision to shield the judgement complained of, it has to be demonstrated that the claims is for pecuniary damages only or for the detention of goods, with or without a claim for pecuniary damages. Herein the plaintiffs' claim is for pecuniary damages and permanent injunction. It does not therefore fall within the ambit of the provision of order IXA rules 5 and 6.

Another issue to be determined by the court, though not raised by both parties, is the jurisdiction of the court, to finally determine a land lord and tenant dispute. This court has judicial notice of the fact that jurisdiction to so determine is within the preserve of the BPRT by virtue of section 4 of the said Act. The superior court, is only vested with jurisdiction on two fronts namely.

1. Statutory jurisdiction limited to appellate jurisdiction donated by section 10 of the parent Act.

2. Case law jurisdiction - This arises from case law, decided by the CA as dutifully followed by the superior courts, that this court, has judicial notice of. It lays down the principle that since an injunctive relief is not one of the remedies that the BPRT has been mandated to give, then, the proper forum for the issuance of such a relief is the high court. The interim relief is meant to provide a temporary reprieve to a tenant threatened with eviction pending determination of the dispute between him and the landlord by the mandated tribunal.

The nature of the relief sought is a matter of consideration. As submitted, proceeding to grant prayer (b), would be tentament to curtailing the freedom of either side moving to exercise their contractual rights to bring that relationship to an end which the law does not prescribe to be a permanent one. Either party has a right to bring it to an end but within the law.

Lastly there is need to comply with the requirement placed on the intended beneficiary of the intended reprieve, where by, he is required to place before the court, the nature of the defence he is going to put forward. Herein although the points on the jurisdiction and nature of the relief have been mentioned in the supporting documents, as well as written skeleton arguments, this court, has not traced a draft defence on the record, even one irregularly filed. The question to be determined is whether by reason of failure to exhibit the draft defence, the defendant is disentitled to the relief being sought. The answer is "NO" because, the failure to exhibit a draft defence not withstanding, the court, is entitled to move on its own under the inherent jurisdiction of the court, to render justice to both litigants. In this courts opinion, ends of justice herein would demand that, one litigant should not be allowed through the legal process to reap that which the law, does not bestow on him. Herein, if the setting aside is not granted, the interlocutory judgement will operate to bestow a benefit to a litigant namely a permanent injunction a relief, or remedy not provided for by the parent Act namely, the landlord, tenants, (shops , hotels and catering establishment) Act cap 301 laws of Kenya. 2ndly having held that the nature of the relief sought by the plaintiff was one which was not a proper candidate for the granting of an interlocutory judgement, as per requirement of the relevant rules, allowing the offending interlocutory judgement to be interfered with, will be tantamount to this court, condoning an illegality which a court of law should not do.

For the reasons given in the assessment this court, is inclined to allow the defendants' application dated 30th June 2008 and filed on the same date for the following reasons:-

1. The nature of the reliefs sought by the plaintiff/Respondent in the plaint, do not fall into the category of reliefs whereby an interlocutory judgement could issue under order IXA rule 6 as read with rule 5 CPR, because these provisions allow entry of interlocutory judgement where only pecuniary damages or value of detained goods are prayed for. Herein in addition to general damages, a permanent injunction was being sought.

2. By reasons of what has been stated in number 1 above, allowing the interlocutory judgement to stand would amount to this court, condoning an illegality something a court of law should not be permitted to do.

3. Allowing the said interlocutory judgement to stand, would also amount to conferring a jurisdiction which is not vested in this court either by statute or by judicial precedent. The reason being that the

parent Act namely cap 301 laws of Kenya confers conclusive jurisdiction to determine issues of disputes arising between a landlord and tenant to the BPRT and not a high court. A high court is only vested with appellate jurisdiction. Original jurisdiction is however donated by judicial precedent emanating from the court, of appeal and as dutifully the superior court for laws by which confers original jurisdiction on to the superior court relating to issuance of an injunctive relief as an interlocutory relief aimed at preserving the status quo pending determination of any issues in controversy raised as concern the landlord and tenant relationship by the mandated tribunal namely BPRT.

4. Permanent injunction is not one of the remedies available to a tenant under a landlord and tenant relationship as per the provision of the parent Act. Allowing this benefit to be bestowed on to the tenant unchallenged, through an interlocutory judgement will amount to bestowing an illegal remedy to a tenant.

5. This court, is alive to the requirement that a party seeking to be heard when approaching the seat of justice as a defendant has a duty to display before the court, the issues he intends to raise. Herein no draft defence has been exhibited. That not withstanding and although, this would have been a reason for disentitling the defendant/applicant, the relief sought in any other case, in this courts', opinion in instances where declining the relief would amount to condoning and shielding an illegality, but would also amount to bestowing to a litigant a remedy not provided for by law and also amount to confirming a jurisdiction on to a court, not donated by either statute or judicial precedent, like in this case, the court, can on its own motion move to set aside the offending interlocutory judgement. In this courts', opinion, this case is one such case where the court, can act on its own motion to set aside the interlocutory judgement.

6. By reason of what has been stated in number 1,2,3,4 and 5 above, the interlocutory judgement entered by the Deputy Registrar on 2/1/2008 be and is hereby set aside.

7. The respondent will have costs of the application because although negotiations were going on, the defendant should have reserved its right to enter appearance and file defence within the prescribed time as soon as the negotiations were over. Had they done so the interlocutory judgement may not have been entered.

8. Allowing the defendant a right to have the matter re opened for them, to be heard, will not prejudice the plaintiff in any way, as they will still have the right to apply to strike out the defence, should the same not be found to be in compliance with the required rules.

9. The defendant will have 30 days from the date of reading of this ruling to file and serve a defence.

10.In default of number 9 above, the plaintiff to move the court, to fix the matter for formal proof.

**DATED, READ AND DELIVERED AT NAIROBI THIS 12TH DAY OF JUNE 2009.**

**R.N. NAMBUYE**

**JUDGE**

REUBEN GITONGA M’ MUGAMBI………………………….PLAINTIFF

**VERSUS**

……………………...DEFENDANT

**RULING**

The defendant/applicant has moved to this court, by way of a chamber summons dated 30th day of June 2008 and filed the same date. It is brought under order IXA rule 10 and 11 of the CPR, section 3A of the CPA and all other enabling provisions of the law. It seeks 2 prayers:-

*1. “That the ex-parte interlocutory judgement herein entered against the defendant/applicant on 20th January 2008 in default of defence be set aside together with all consequential orders.*

*2. That cost of this application be in the cause.”*

The background information to the application is that the suit herein was initiated by the plaintiff/respondent filing a plaint dated 16th September 2004, and filed on the 17th day of September 2004, simultaneously with an interim application also dated 16th day of September 2004 and filed the same 17th September 2007. Which application had sought 4 prayers namely:-

*1. “That the application herein be certified as a urgent and be heard in priority basis.*

*2. That the Respondent be compelled to re-open the Business premises of the applicant.*

*3. That the Defendant be restrained from closing and or interfering with the plaintiff Business premises.*

*4. That cost of this application be provided for in the cause”.*

The said application had been brought under order XXXIX rule 1 and 2 (9) of the CPR, section 3A of the CPA.

(a) The defendant who was a respondent to that application filed a preliminary objection dated 24tth September 2004 and filed the same date, raising three (3) objections namely:-

*1. That the provision of order L rule 16 (i) have not been complied with.*

*2. That this court, has no jurisdiction under the landlord and tenant (shops, Hotels and catering establishment) Act cap 301 laws of Kenya, to hear and determine the plaintiff/applicants application dated 16th September 2004.*

*3. That there is no priority of contract between the plaintiff/applicant and the defendant/Respondent.*

The said processes gave rise to a ruling delivered by Ojwang J on the 4th day of February 2005 who made the following findings:-

***(a).*** *The plaintiff has a genuine business premises.*

***(b).*** *The defendant had let its premises so that it may be used as business premises to the Kenya police a department in the office of the president.*

***(c).*** *The plaintiff did hold a valid tenancy, a protected tenancy with the Kenya Police over the suit premises which is the property of an independent, parastatal corportion which may sue and be sued in its own corporate name.*

***(d).*** *Allegation that the contract between the plaintiff and the Kenya police had expired was disputed, a fact which had to be proved at the trial.*

***(e).*** *The moment disputed issues are thus joined, it ceases as a matter of law to be open to a landlord to unilaterally evict or shut out the tenant as the tenants grievances are thereby rendered absolutely nugatory, which is contrary to the letter and spirit of the law.*

***(f).*** *The circumstances in which the defendant has shut down the plaintiffs premises smack of the sort of high handedness that has the effect of corrupting the proper functioning of the legal process.*

***(g).*** *It had not been disputed that all the plaintiffs' wares had simply been locked in the suit premises and the plaintiff simply given matching orders.*

***(h).*** *That would be illegal because the plaintiff has constitutional rights to his property which nobody is allowed to confisticates, the plaintiff legitimate economic activities, which ultimately link up to property rights are subject only, in general terms to the laws of contract.*

***(i).*** *The plaintiff has a genuine complaint that by reason of the contractual relationship between them, he was entitled to a proper notice and the action of locking up his Perishable goods is likely to cause him economic loss.*

***(j).*** *By reasons of what has been stated above the defendant was ordered to reopen the premises forth with and in any case not later than within 21 days from the date of the making of the order, keep it open pending either the making of a suitable arrangement between the parties or the hearing and determination of Business premises Rent, Tribunal case No. 360 of 2004 whichever one is accomplished first in time.*

There appears to have been an application presented under certificate of urgency dated 19th day of April 2005 and filed on 20th April 2005 brought under order XLIV rule, order XXXIX rule 4, order XXI rule 23 of the CPR, section 63 (e) and 3A of the CPA, and all other enabling provisions of the law. It sought 4 prayers namely:-

*1. That the application be certified urgent and heard exparte in the first instance.*

*2. That pending hearing and determination of this application, the Honourable court, do order stay of execution of the ruling delivered on 4th February 2005 and the resultant orders.*

*3. That the Honourbale court, be pleased to review its ruling and/or order delivered on 4th February 2005.*

*4. That the costs of this application be in the cause. The record is not very clear as to what become of that application.*

The summons to enter appearance were taken out on the 22nd day of October 2007. There is a R/S sworn by one Noel M.N. Munyithya on the 12th day of November 2007. Paragraph 3 thereof depones that the defendant was served on the same date on 24/10/07 with the summons to enter appearance annexed to the R/S. There is an endorsed copy of summons to enter appearance evidencing service of the same on 24/10/2007 at 10/30 a.m.

Apparently no appearance and defence were filed. This default on their part prompted the filing of a request for judgement dated 12th day of November 2007 and filed on 13th November 2007 made under order IXA rule 6. The content reads:-

"*The plaintiff request interlocutory judgement against the defendant Kenyatta National hospital who has failed to appear within the prescribed time, prescribed by the rules of this Honourable court."* A perusal of the said document reveals that the same was placed before the SPDR on 15/1/08 for direction, who gave directions for the interlocutory judgement to be entered as prayed which interlocutory judgement was endorsed by the Deputy Registrar on the 21st day of January 2008, and there after the matter listed for formal proof. The listing of the matter for formal proof prompted the defendant/applicant to present the application subject of this ruling. It is dated 30th day of June 2008 and filed the same date. It is brought under order IXA rues 10 and 11CPR, section 3A of the CPA, and all other enabling provision, of the law. It seeks 2 prayers namely:-

*1. That the exparte interlocutory judgement herein entered against the defendant/applicant on 20th January 2008 in default of defence be set aside together with all consequential orders.*

*2. That cost of this application be in the cause.*

The grounds in support are set out in the body of the application supporting affidavit, annextures and oral representations as well as case law. The major ones are as follows:-

**(i).** Indeed the plaintiff filed suit in 2004 with an interim application which gave rise to the ruling by justice Ojwang on 4th February 2005 annextures WM1.

**(ii).** In pursuance of directions given by the said learned judge in the said ruling, a lease was duly executed between the parties, annexture MW2.

**(iii).** Upon execution of the said lease, the defendant made several attempts to have the matter negotiated between them and the plaintiff with a view of having the same settled amicably out of court. In pursuance of which various meetings were held between the defendant and the plaintiffs advocates.

**(iv).** That consequent upon the signing of the afore said lease, the plaintiff filed, signed and or neglected to prosecute the reference at the tribunal being BPRT cause number 360 of 2004 which was consequently dismissed for want of prosecution on the 18th day of December 2007.

**(v).** It is their stand that since the matter was referred to the tribunal by this courts' ruling of 4/2/2005 meant, that the tribunal, was the best forum for the resolution of the dispute herein.

**(vi).** It is their stand that failure of the plaintiff to prosecute the said tribunal proceedings was simply intended to delay the finalization of the matter herein as well as to steal a match against the defendant, and this is an abuse of the due process of the court. More so when the suit was filed on 17/9/04 but summons to enter appearance were taken out and served more than three years later on 22/10/07 and served on 24/10/07.

**(vii).** The plaintiff lured and or enticed the defendant to enter into negotiations for an out of court settlement, only to turn round and attempt to fix the matter for formal proof.

**(viii).** Contend both the request and entry of the said interlocutory judgement was irregular as the defendant had agreed to enter into negotiations to resolve the matter which resolution is yet to be reached.

**(ix).** The reason for failing to enter appearance and file defence in time is because negotiations were going on between the parties. The delay is therefore excusable more so when it is not inordinate.

**(x).** It will be unfair and prejudicial to the defendant if they will be shut out from these proceedings

without being heard on their defence, which raises triable issues, in that they contend that the plaintiffs' suit, is an abuse of the due process of the court, and 2ndly that the high court, has no jurisdiction to entertain the dispute herein.

**(xi).** They contend that it is in the interest of justice that the matter herein be re- opened so that both parties are heard on the same on its own merit.

In their skeleton arguments dated and filed the 23rd February 2008, learned counsel reiterated the grounds in the supporting and further supporting affidavit and then stressed the following:-

(b) The relief sought by the plaintiff are:-

(a) General damages

(b) An order, permanently restraining the defendant, by itself, and or its agent and its servants, and or its employees, from interfering with the plaintiffs' gulet possession of his Business premises and comply with the provision of chapter 301.

(c) Costs of this case and interest at court, rates.

(d) Any other relief that this court, deems fit and just to grant.

The reference number 360 of 2004 was filed by the plaintiff at the Business premises rent Tribunal on 16th September 2004, simultaneously with the subject suit and an interim application in the suit. A ruling was given in respect to that interim application. An application to stay those interim orders was marked stood over generally to enable parties negotiate the matter amicably.

(c) They contend the interlocutory judgement entered herein is irregular because order IXA of the CPR which makes provision for entry of default judgement does not permit the entry of judgement as it has happened in this case, since all questions requiring adjudication must be brought for hearing before a judge and not before the Deputy Registrar because:-

**(a).** The Registrars' mandate and jurisdiction is strictly limited to the application of automatic out comes of the play of the court procedures rules.

**(b).** The Deputy Registrar, has no jurisdiction and or power to issue a permanent injunction as prayed in the plaint by the plaintiff/Respondent.

By reasons of what has been stated above, they submit that the action taken by the Deputy Registrar, was improper and irregular, and therefore a basis for setting aside.

-They complied with justice Ojwang's ruling of 4/2/05 by entering into a lease agreement dated 2nd June 2006 with the plaintiff and since then the defendant has not interfered with the plaintiffs' Business premises ever since, signified by the fact that the plaintiff is still carrying on business in the said premises.

-It is their stand that the matter was dismissed by the Business premises tribunal, for want of prosecution and not withdrawn as alleged by the plaintiff in their replying affidavit.

- The court, is urged to accept the applicants reason for the delay in entering appearance and filing defence as being because negotiations had been going on between the parties culminating in the signing of the lease exhibited and it had also been hoped that the matter would be resolved amicably.

- They also contend that they have triable issues in that the defendant cannot be possibly permanently restrained as an owner of the premises from exercising its right to rent/ let or enter into other contracts

regarding the said premises or alternatively to prevent the defendant from exercising its constitutional rights over the said properties.

The plaintiff/respondent moved to oppose the application on the basis of grounds set out in the replying and further replying affidavit, as well as written skeleton arguments. These are:-

- In the ruling of 4/2/05 the learned judge ordered the defendants to open the premises forthwith, but this was not complied with until 2nd day of June 2006 a period of 600 days later, after contempt proceedings had been commenced.

- Indeed the plaintiff advocates approached the defendant with a view to settling the matter amicably out of court, but the defendant did not respond to the same.

- That indeed a reference number 360 of 2004 was filed out of the business premises tribunal, but the same was later on withdrawn.

- Denied abusing the due process of the court.

- That he is in possession of the said premises as a result of a court, order made on 4/2/05.

- That the defendant/applicant has not conducted themselves in good faith in relation to the proceedings.

- Deny that any proceedings took place on 18th December 2008 before the tribunal where by the tribunal proceedings was allegedly dismissed for want of prosecution.

In their written skeleton arguments, the learned counsel for the plaintiff/respondent reiterated the content of the replying affidavit the history of the proceedings and then stressed the following:-

- Concede they moved to this court, seeking the aforementioned reliefs.

- Concede they also moved to the Business premises and filed a reference.

- Concede the suit had been simultaneously filed with an interim application via whose ruling the defendant was ordered to open the premises, which they eventually did and there after parties executed a two year lease.

- Concede that after the signing of the lease the parties entered into negotiations as regards damages payable but the negotiations failed.

- That there is no defence to their claim as all that was left for determination is an assessment of damages payable to the plaintiff.

The defendant referred the court, to case law as well. There is the case of **WAIBOCI AND ANOTHER VERSUS PASHITO HOLDINGS LIMITED AND 7 OTHERS (2004) 2KLR 415.** On an application for setting aside Ojwang J on the 8th October 2005. The learned judge held inter alia that:-

*(i) An entirely Regular interlocutory judgement can be set aside where the Defendant happens to have and places before the court, a reasonable defence on the merits and an assessment of such merits may be made on the basis of the draft defence.*

*(ii) A defendant who seeks the setting aside of an interlocutory judgement because he had been prevented by some cause from filing and serving his papers as required has a dutys to bring before the court an explanation of the circumstances in which such hardship had arisen, and it is for the court, to assess the merits of the request and to apply its discretion as necessary.*

(iii) *A matter which does not entail a claim for pecuniary damages or for detention of goods with or without a claim for pecuniary damages is not a proper one in respect of which the Deputy Registrar can enter interlocutory judgement*.

The case of **EASTERN AND SOUTHERN AFRICAN TRADE AND DEVELOPMENT BANK (the PTA Bank) VERSUS CAPTAIN MUSA HASSAN BUSHAN NAIROBI MILIMANI COMMERCIAL COURT NO. 544 OF 2002 (OS)**, decided by T. Mbaluto judge on the 4th day of February 2003. among others the applicant sought the setting aside of the interlocutory judgement plus all consequential orders which had been entered by reason of failure to file a defence which application was allowed on the ground that no interlocutory judgement can be entered in an originating summons.

The case of **FURSYS (K) LTD VERSUS SYSTEMS INTERGRATED LIMITED T/A SYMPHONY NAIROBI MILIMANI HCCC NO. 1237 OF 2002** decided by Njagi J on the 27th day of April 2004. At page 8 of the ruling line 5 from the bottom there is observation that:

"*In an application to set aside an exparte judgement there are no limits or restrictions on the judges' discretion. The discretion is totally unfettered except that it should be exercised judiciously and that it should be based on such terms as may be just because the main concern of the court, is to do justice to the parties"*

At page 9 of the ruling the learned judge quoted with approval the case of **JESSE KIMANI VERSUS MACCONNEL (1966) EA 547** in which it had been held that some matters to be considered in such applications are the facts and circumstances, both prior and subsequent and all the respective merits of the parties together with any other material factors which appear to have entered into the passing of the judgement which would not or might not have been present had the judgement not been exparte and whether or not it would be just and reasonable to set a side or vary the judgement upon terms to be imposed.

Also quoted with approval was the case of **JAMNADAS SODHIA VERSUS GORDANDAS HEMRAS (1952) 7 ULR11** In which the court, was of the view that, "*the nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered ….. and finally, it should be remembered that to deny the subject a hearing should be the last resort of a court"*

The case of **CRYSTAL MOTTORS (K) LIMITED VERSUS OCCIDENTAL INSURANCE COMPANY LIMITED NAIROBI MILIMANI COMMERCIAL HCCC NO. 91 OF 2007** decided by Warsame J on the 6th day of June 2007, in which an interlocutory judgement though, regular was set aside, because the plaintiff failed to alert the defendant that they would apply for entry of interlocutory judgement upon failure to materialize the negotiations.

The case of **WAWERU VERSUS NDIGA (1983) KLR 238-245**, a court of appeal decision which held inter alia:-

*(i) "Order IXA rule 10 of the CPR empowers the court, to set aside or vary exparte judgement upon such terms as are just and there is no requirement of showing sufficient cause.*

*(ii) In an application under order IXA rule 10 of the CPR*

*(a) The court, has an unfettered discretion to do justice between the parties,*

*(b) It may be just on the facts of the particular case, to avoid hardship or in justice arising from in advertence or mistake even through negligent, but the discretion should not be exercised to assist any one to delay the course of justice*

*(c) The court, of Appeal will not interfere with the judges exercise of discretion unless there has been a misdiscretion leading to a wrong decision or manifestly wrong decision leading to injustice.*

*(d) An application to set aside an exparte judgement made by a defendant may be allowed if the court, is satisfied that the summons to enter appearance were not duly served or that he was presented by any sufficient cause from appearing when the suit was called for hearing"*

The case of **PATEL VERSUS E.A. CARGO HANDLING SERVICES LIMITED (1974) EA 75** where it was held inter alia that:-

*(i) The discretion of the court is not limited"*

On the courts', assessment of the facts herein, it is clear that there is no dispute that the re is in place an interlocutory judgement which the defendant/applicant has moved to this court seeking the intervention of the court. The right to seek the intervention of the court, is anchored on the provisions of order IXA rule 10 and 11 CPR, with rule 11 simply making provision of the mode of procedure, that a litigant needs to use in order to access the relief provided for in rule 10. Rule 10 is the provision of law that Employs the command on setting a side. It simply reads:-

"*Order IXA rule 10:- where a judgement has been entered under this order, the court, may set a side or vary such judgment and any consequential decree or order upon such terms as are just"*

This courts' construction of that rule is that there are three pre-requisites to be met by the litigant namely:-

**(i).** Satisfaction that the judgement complained of had been entered under that provision. The court, finds this satisfied because the request for judgement dated 12th November 2007, and filed on 13th November 2007 was made under order IXA rule 6 CPR.

**(ii).** Satisfaction that the address is made to a court of law. This too has been satisfied in that the application for setting aside has been presented to this court.

**(iii).** The command to the court, is conveyed by the word "May". This court has judicial notice of the fact that construction of the said word by case law that this court, has judicial notice of 15 to the effect that the word denates judicial discretion" This is further supported by the use of the words " as are just"

**(iv).** The action to be undertaken by the court, is to set aside or vary such a judgement.

The yard stick for the exercise of the judicial discretion, donates by the rules is not in built. This has been provided by case law emanating from the court, of appeal and as dutifully followed by the superior court. This established principles provide applicable guidelines. Although this court, has judicial notice of the same and safely apply them here, there is no harm in setting them out in the record. These are:

**(i).** The judicial discretion donated by the rule is not limited.

**(ii).** The court, is enjoined not to fetter itself from the exercise of the said discretion.

**(iii).** The only fetter applicable to the exercise of the said discretion, is that the same has to be exercised judiciously and with a reason.

**(iv).** In relation to setting aside, it meant to be exercised in favour of a party who through in advertence or excusable mistake failed to take a procedural steps leading to the exparte orders being made against the said party.

**(v).** It is never to be exercised in favour of a party who has deliberately sought whether by evasion or otherwise to delay the course of justice.

**(vi).** When determining whether to exercise the same or not, the court, should look at the prevailing immediately before and after the entry of the said interlocutory judgement.

**(vii).** The court, to determine whether the offending judgement fall into the category of regular or irregular judgement.

**(viii).** Where the setting aside of the exparte orders, is being sought with a view to creating an avenue for the other side to be heard, the court, is enjoined to look at the defence being put forward however irregular.

**(ix).** The court, to take note of the guiding principle that denying a party from being heard or as has become to be popularly known, driving a litigant from the seat of justice should be a last resort of any court of law.

These principles have been applied to the rival arguments herein and the court, has made findings to the effect that there is no dispute that indeed summons to enter appearance were taken out and served but the defendant entered in appearance nor filed defence leading to the entry of the said judgement.

The question for determination by this court, is whether the applicant has brought itself within the ingredients warranting this court, to exercise or decline to exercise its discretion. In doing so, the court, has to determine whether this was a regular or irregular judgement. From its judicial notice, this court, is aware that there is now an abundance of case law, on the subject to the effect that a Regular judgement is one which has been properly entered in accordance with the rules, where as an irregular judgement is one which has been entered contrary to the rules. This arise where an interlocutory judgement has been entered in a cause where it is not permisable in law to enter the same as found by Mbaluto J in the case of **EASTERN AND SOUTHERN AFRICAN TRADE AND DEVELOPMENT BANK THE PTA VERSUS CAPTAIN MUSA HASSSAN BULHAN (SUPRA)** in which the learned judge ruled that no interlocutory judgement can be entered in an originating summons.

The foregoing being the case, it is necessary to scrutinize the nature of the claims and then marry it to the provisions of law, dealing with the nature of the claims that are proper candidates for entering of interlocutory judgement. A perusal of the plaint on record reveals that vide paragraph 3, the plaintiff has averred that he is a protected tenant, of a canteen within the defendant's premises, which the defendant unlawfully closed. By reason of the said unlawful closure he filed a reference NO. BPRT 360 (2004) By reason of that, the plaintiffs seek the reliefs specified in the plaint.

It therefore follows that in order to be protected, it has to fall within the ambit of order IXA ruled 6, under which the request for judgement was made. In order for rule 6 to apply, the plaint must be drawn as mentioned in rule 5 CPR. Rule 5 provides inter alia that:-

"*Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages"* This court, has construed this provision and it is of the opinion that in order for this provision to shield the judgement complained of, it has to be demonstrated that the claims is for pecuniary damages only or for the detention of goods, with or without a claim for pecuniary damages. Herein the plaintiffs' claim is for pecuniary damages and permanent injunction. It does not therefore fall within the ambit of the provision of order IXA rules 5 and 6.

Another issue to be determined by the court, though not raised by both parties, is the jurisdiction of the court, to finally determine a land lord and tenant dispute. This court has judicial notice of the fact that jurisdiction to so determine is within the preserve of the BPRT by virtue of section 4 of the said Act. The superior court, is only vested with jurisdiction on two fronts namely.

1. Statutory jurisdiction limited to appellate jurisdiction donated by section 10 of the parent Act.

2. Case law jurisdiction - This arises from case law, decided by the CA as dutifully followed by the superior courts, that this court, has judicial notice of. It lays down the principle that since an injunctive relief is not one of the remedies that the BPRT has been mandated to give, then, the proper forum for the issuance of such a relief is the high court. The interim relief is meant to provide a temporary reprieve to a tenant threatened with eviction pending determination of the dispute between him and the landlord by the

mandated tribunal.

The nature of the relief sought is a matter of consideration. As submitted, proceeding to grant prayer (b), would be tentament to curtailing the freedom of either side moving to exercise their contractual rights to bring that relationship to an end which the law does not prescribe to be a permanent one. Either party has a right to bring it to an end but within the law.

Lastly there is need to comply with the requirement placed on the intended beneficiary of the intended reprieve, where by, he is required to place before the court, the nature of the defence he is going to put forward. Herein although the points on the jurisdiction and nature of the relief have been mentioned in the supporting documents, as well as written skeleton arguments, this court, has not traced a draft defence on the record, even one irregularly filed. The question to be determined is whether by reason of failure to exhibit the draft defence, the defendant is disentitled to the relief being sought. The answer is “NO” because, the failure to exhibit a draft defence not withstanding, the court, is entitled to move on its own under the inherent jurisdiction of the court, to render justice to both litigants. In this courts opinion, ends of justice herein would demand that, one litigant should not be allowed through the legal process to reap that which the law, does not bestow on him. Herein, if the setting aside is not granted, the interlocutory judgement will operate to bestow a benefit to a litigant namely a permanent injunction a relief, or remedy not provided for by the parent Act namely, the landlord, tenants, (shops , hotels and catering establishment) Act cap 301 laws of Kenya. 2ndly having held that the nature of the relief sought by the plaintiff was one which was not a proper candidate for the granting of an interlocutory judgement, as per requirement of the relevant rules, allowing the offending interlocutory judgement to be interfered with, will be tantamount to this court, condoning an illegality which a court of law should not do.

For the reasons given in the assessment this court, is inclined to allow the defendants’ application dated 30th June 2008 and filed on the same date for the following reasons:-

1. The nature of the reliefs sought by the plaintiff/Respondent in the plaint, do not fall into the category of reliefs whereby an interlocutory judgement could issue under order IXA rule 6 as read with rule 5 CPR, because these provisions allow entry of interlocutory judgement where only pecuniary damages or value of detained goods are prayed for. Herein in addition to general damages, a permanent injunction was being sought.

2. By reasons of what has been stated in number 1 above, allowing the interlocutory judgement to stand would amount to this court, condoning an illegality something a court of law should not be permitted to do.

3. Allowing the said interlocutory judgement to stand, would also amount to conferring a jurisdiction which is not vested in this court either by statute or by judicial precedent. The reason being that the parent Act namely cap 301 laws of Kenya confers conclusive jurisdiction to determine issues of disputes arising between a landlord and tenant to the BPRT and not a high court. A high court is only vested with appellate jurisdiction. Original jurisdiction is however donated by judicial precedent emanating from the court, of appeal and as dutifully the superior court for laws by which confers original jurisdiction on to the superior court relating to issuance of an injunctive relief as an interlocutory relief aimed at preserving the status quo pending determination of any issues in controversy raised as concern the landlord and tenant relationship by the mandated tribunal namely BPRT.

4. Permanent injunction is not one of the remedies available to a tenant under a landlord and tenant relationship as per the provision of the parent Act. Allowing this benefit to be bestowed on to the tenant unchallenged, through an interlocutory judgement will amount to bestowing an illegal remedy to a tenant.

5. This court, is alive to the requirement that a party seeking to be heard when approaching the seat of justice as a defendant has a duty to display before the court, the issues he intends to raise. Herein no draft defence has been exhibited. That not withstanding and although, this would have been a reason for disentitling the defendant/applicant, the relief sought in any other case, in this courts’, opinion in instances where declining the relief would amount to condoning and shielding an illegality, but would

also amount to bestowing to a litigant a remedy not provided for by law and also amount to confirming a jurisdiction on to a court, not donated by either statute or judicial precedent, like in this case, the court, can on its own motion move to set aside the offending interlocutory judgement. In this courts', opinion, this case is one such case where the court, can act on its own motion to set aside the interlocutory judgement.

6. By reason of what has been stated in number 1,2,3,4 and 5 above, the interlocutory judgement entered by the Deputy Registrar on 2/1/2008 be and is hereby set aside.

7. The respondent will have costs of the application because although negotiations were going on, the defendant should have reserved its right to enter appearance and file defence within the prescribed time as soon as the negotiations were over. Had they done so the interlocutory judgement may not have been entered.

8. Allowing the defendant a right to have the matter re opened for them, to be heard, will not prejudice the plaintiff in any way, as they will still have the right to apply to strike out the defence, should the same not be found to be in compliance with the required rules.

9. The defendant will have 30 days from the date of reading of this ruling to file and serve a defence.

10.In default of number 9 above, the plaintiff to move the court, to fix the matter for formal proof.

**DATED, READ AND DELIVERED AT NAIROBI THIS 12TH DAY OF JUNE 2009.**

**R.N. NAMBUYE**

**JUDGE**

REUBEN GITONGA M' MUGAMBI………………………….PLAINTIFF

**VERSUS**

……………………...DEFENDANT

**RULING**

The defendant/applicant has moved to this court, by way of a chamber summons dated 30th day of June 2008 and filed the same date. It is brought under order IXA rule 10 and 11 of the CPR, section 3A of the CPA and all other enabling provisions of the law. It seeks 2 prayers:-

*1. "That the ex-parte interlocutory judgement herein entered against the defendant/applicant on 20th January 2008 in default of defence be set aside together with all consequential orders.*

*2. That cost of this application be in the cause."*

The background information to the application is that the suit herein was initiated by the plaintiff/respondent filing a plaint dated 16th September 2004, and filed on the 17th day of September 2004, simultaneously with an interim application also dated 16th day of September 2004 and filed the same 17th September 2007. Which application had sought 4 prayers namely:-

1. *"That the application herein be certified as a urgent and be heard in priority basis.*

2. *That the Respondent be compelled to re-open the Business premises of the applicant.*

3. *That the Defendant be restrained from closing and or interfering with the plaintiff Business premises.*

4. *That cost of this application be provided for in the cause".*

The said application had been brought under order XXXIX rule 1 and 2 (9) of the CPR, section 3A of the CPA.

(a) The defendant who was a respondent to that application filed a preliminary objection dated 24tth September 2004 and filed the same date, raising three (3) objections namely:-

1. *That the provision of order L rule 16 (i) have not been complied with.*

2. *That this court, has no jurisdiction under the landlord and tenant (shops, Hotels and catering establishment) Act cap 301 laws of Kenya, to hear and determine the plaintiff/applicants application dated 16th September 2004.*

3. *That there is no priority of contract between the plaintiff/applicant and the defendant/Respondent.*

The said processes gave rise to a ruling delivered by Ojwang J on the 4th day of February 2005 who made the following findings:-

***(a).****The plaintiff has a genuine business premises.*

***(b).*** *The defendant had let its premises so that it may be used as business premises to the Kenya police a department in the office of the president.*

***(c).*** *The plaintiff did hold a valid tenancy, a protected tenancy with the Kenya Police over the suit premises which is the property of an independent, parastatal corportion which may sue and be sued in its own corporate name.*

***(d).*** *Allegation that the contract between the plaintiff and the Kenya police had expired was disputed, a fact which had to be proved at the trial.*

***(e).*** *The moment disputed issues are thus joined, it ceases as a matter of law to be open to a landlord to unilaterally evict or shut out the tenant as the tenants grievances are thereby rendered absolutely nugatory, which is contrary to the letter and spirit of the law.*

***(f).*** *The circumstances in which the defendant has shut down the plaintiffs premises smack of the sort of high handedness that has the effect of corrupting the proper functioning of the legal process.*

***(g).*** *It had not been disputed that all the plaintiffs' wares had simply been locked in the suit premises and the plaintiff simply given matching orders.*

***(h).*** *That would be illegal because the plaintiff has constitutional rights to his property which nobody is allowed to confisticates, the plaintiff legitimate economic activities, which ultimately link up to property rights are subject only, in general terms to the laws of contract.*

***(i).*** *The plaintiff has a genuine complaint that by reason of the contractual relationship between them, he was entitled to a proper notice and the action of locking up his Perishable goods is likely to cause him economic loss.*

***(j).*** *By reasons of what has been stated above the defendant was ordered to reopen the premises forth*

*with and in any case not later than within 21 days from the date of the making of the order, keep it open pending either the making of a suitable arrangement between the parties or the hearing and determination of Business premises Rent, Tribunal case No. 360 of 2004 whichever one is accomplished first in time.*

There appears to have been an application presented under certificate of urgency dated 19th day of April 2005 and filed on 20th April 2005 brought under order XLIV rule, order XXXIX rule 4, order XXI rule 23 of the CPR, section 63 (e) and 3A of the CPA, and all other enabling provisions of the law. It sought 4 prayers namely:-

1. *That the application be certified urgent and heard exparte in the first instance.*

2. *That pending hearing and determination of this application, the Honourable court, do order stay of execution of the ruling delivered on 4th February 2005 and the resultant orders.*

3. *That the Honourbale court, be pleased to review its ruling and/or order delivered on 4th February 2005.*

4. *That the costs of this application be in the cause. The record is not very clear as to what become of that application.*

The summons to enter appearance were taken out on the 22nd day of October 2007. There is a R/S sworn by one Noel M.N. Munyithya on the 12th day of November 2007. Paragraph 3 thereof depones that the defendant was served on the same date on 24/10/07 with the summons to enter appearance annexed to the R/S. There is an endorsed copy of summons to enter appearance evidencing service of the same on 24/10/2007 at 10/30 a.m.

Apparently no appearance and defence were filed. This default on their part prompted the filing of a request for judgement dated 12th day of November 2007 and filed on 13th November 2007 made under order IXA rule 6. The content reads:-

"*The plaintiff request interlocutory judgement against the defendant Kenyatta National hospital who has failed to appear within the prescribed time, prescribed by the rules of this Honourable court."* A perusal of the said document reveals that the same was placed before the SPDR on 15/1/08 for direction, who gave directions for the interlocutory judgement to be entered as prayed which interlocutory judgement was endorsed by the Deputy Registrar on the 21st day of January 2008, and there after the matter listed for formal proof. The listing of the matter for formal proof prompted the defendant/applicant to present the application subject of this ruling. It is dated 30th day of June 2008 and filed the same date. It is brought under order IXA rues 10 and 11CPR, section 3A of the CPA, and all other enabling provision, of the law. It seeks 2 prayers namely:-

1. *That the exparte interlocutory judgement herein entered against the defendant/applicant on 20th January 2008 in default of defence be set aside together with all consequential orders.*

2. *That cost of this application be in the cause.*

The grounds in support are set out in the body of the application supporting affidavit, annextures and oral representations as well as case law. The major ones are as follows:-

**(i).** Indeed the plaintiff filed suit in 2004 with an interim application which gave rise to the ruling by justice Ojwang on 4th February 2005 annextures WM1.

**(ii).** In pursuance of directions given by the said learned judge in the said ruling, a lease was duly executed between the parties, annexture MW2.

**(iii).** Upon execution of the said lease, the defendant made several attempts to have the matter negotiated between them and the plaintiff with a view of having the same settled amicably out of court. In pursuance of which various meetings were held between the defendant and the plaintiffs advocates.

**(iv).** That consequent upon the signing of the afore said lease, the plaintiff filed, signed and or neglected to prosecute the reference at the tribunal being BPRT cause number 360 of 2004 which was consequently dismissed for want of prosecution on the 18th day of December 2007.

**(v).** It is their stand that since the matter was referred to the tribunal by this courts' ruling of 4/2/2005 meant, that the tribunal, was the best forum for the resolution of the dispute herein.

**(vi).** It is their stand that failure of the plaintiff to prosecute the said tribunal proceedings was simply intended to delay the finalization of the matter herein as well as to steal a match against the defendant, and this is an abuse of the due process of the court. More so when the suit was filed on 17/9/04 but summons to enter appearance were taken out and served more than three years later on 22/10/07 and served on 24/10/07.

**(vii).** The plaintiff lured and or enticed the defendant to enter into negotiations for an out of court settlement, only to turn round and attempt to fix the matter for formal proof.

**(viii).**Contend both the request and entry of the said interlocutory judgement was irregular as the defendant had agreed to enter into negotiations to resolve the matter which resolution is yet to be reached.

**(ix).** The reason for failing to enter appearance and file defence in time is because negotiations were going on between the parties. The delay is therefore excusable more so when it is not inordinate.

**(x).** It will be unfair and prejudicial to the defendant if they will be shut out from these proceedings without being heard on their defence, which raises triable issues, in that they contend that the plaintiffs' suit, is an abuse of the due process of the court, and 2ndly that the high court, has no jurisdiction to entertain the dispute herein.

**(xi).** They contend that it is in the interest of justice that the matter herein be re- opened so that both parties are heard on the same on its own merit.

In their skeleton arguments dated and filed the 23rd February 2008, learned counsel reiterated the grounds in the supporting and further supporting affidavit and then stressed the following:-

(b) The relief sought by the plaintiff are:-

(a) General damages

(b) An order, permanently restraining the defendant, by itself, and or its agent and its servants, and or its employees, from interfering with the plaintiffs' gulet possession of his Business premises and comply with the provision of chapter 301.

(c) Costs of this case and interest at court, rates.

(d) Any other relief that this court, deems fit and just to grant.

The reference number 360 of 2004 was filed by the plaintiff at the Business premises rent Tribunal on 16th September 2004, simultaneously with the subject suit and an interim application in the suit. A ruling was given in respect to that interim application. An application to stay those interim orders was marked stood over generally to enable parties negotiate the matter amicably.

(c) They contend the interlocutory judgement entered herein is irregular because order IXA of the CPR

which makes provision for entry of default judgement does not permit the entry of judgement as it has happened in this case, since all questions requiring adjudication must be brought for hearing before a judge and not before the Deputy Registrar because:-

**(a).**The Registrars' mandate and jurisdiction is strictly limited to the application of automatic out comes of the play of the court procedures rules.

**(b)**The Deputy Registrar, has no jurisdiction and or power to issue a permanent injunction as prayed in the plaint by the plaintiff/Respondent.

By reasons of what has been stated above, they submit that the action taken by the Deputy Registrar, was improper and irregular, and therefore a basis for setting aside.

-They complied with justice Ojwang's ruling of 4/2/05 by entering into a lease agreement dated 2nd June 2006 with the plaintiff and since then the defendant has not interfered with the plaintiffs' Business premises ever since, signified by the fact that the plaintiff is still carrying on business in the said premises.

-It is their stand that the matter was dismissed by the Business premises tribunal, for want of prosecution and not withdrawn as alleged by the plaintiff in their replying affidavit.

- The court, is urged to accept the applicants reason for the delay in entering appearance and filing defence as being because negotiations had been going on between the parties culminating in the signing of the lease exhibited and it had also been hoped that the matter would be resolved amicably.

- They also contend that they have triable issues in that the defendant cannot be possibly permanently restrained as an owner of the premises from exercising its right to rent/ let or enter into other contracts regarding the said premises or alternatively to prevent the defendant from exercising its constitutional rights over the said properties.

The plaintiff/respondent moved to oppose the application on the basis of grounds set out in the replying and further replying affidavit, as well as written skeleton arguments. These are:-

- In the ruling of 4/2/05 the learned judge ordered the defendants to open the premises forthwith, but this was not complied with until 2nd day of June 2006 a period of 600 days later, after contempt proceedings had been commenced.

- Indeed the plaintiff advocates approached the defendant with a view to settling the matter amicably out of court, but the defendant did not respond to the same.

- That indeed a reference number 360 of 2004 was filed out of the business premises tribunal, but the same was later on withdrawn.

- Denied abusing the due process of the court.

- That he is in possession of the said premises as a result of a court, order made on 4/2/05.

- That the defendant/applicant has not conducted themselves in good faith in relation to the proceedings.

- Deny that any proceedings took place on 18th December 2008 before the tribunal where by the tribunal proceedings was allegedly dismissed for want of prosecution.

In their written skeleton arguments, the learned counsel for the plaintiff/respondent reiterated the content of the replying affidavit the history of the proceedings and then stressed the following:-

- Concede they moved to this court, seeking the aforementioned reliefs.

- Concede they also moved to the Business premises and filed a reference.

- Concede the suit had been simultaneously filed with an interim application via whose ruling the defendant was ordered to open the premises, which they eventually did and there after parties executed a two year lease.

- Concede that after the signing of the lease the parties entered into negotiations as regards damages payable but the negotiations failed.

- That there is no defence to their claim as all that was left for determination is an assessment of damages payable to the plaintiff.

The defendant referred the court, to case law as well. There is the case of **WAIBOCI AND ANOTHER VERSUS PASHITO HOLDINGS LIMITED AND 7 OTHERS (2004) 2KLR 415.** On an application for setting aside Ojwang J on the 8th October 2005. The learned judge held inter alia that:-

*(i) An entirely Regular interlocutory judgement can be set aside where the Defendant happens to have and places before the court, a reasonable defence on the merits and an assessment of such merits may be made on the basis of the draft defence.*

*(ii) A defendant who seeks the setting aside of an interlocutory judgement because he had been prevented by some cause from filing and serving his papers as required has a dutys to bring before the court an explanation of the circumstances in which such hardship had arisen, and it is for the court, to assess the merits of the request and to apply its discretion as necessary.*

(iii) *A matter which does not entail a claim for pecuniary damages or for detention of goods with or without a claim for pecuniary damages is not a proper one in respect of which the Deputy Registrar can enter interlocutory judgement*.

The case of **EASTERN AND SOUTHERN AFRICAN TRADE AND DEVELOPMENT BANK (the PTA Bank) VERSUS CAPTAIN MUSA HASSAN BUSHAN NAIROBI MILIMANI COMMERCIAL COURT NO. 544 OF 2002 (OS)**, decided by T. Mbaluto judge on the 4th day of February 2003. among others the applicant sought the setting aside of the interlocutory judgement plus all consequential orders which had been entered by reason of failure to file a defence which application was allowed on the ground that no interlocutory judgement can be entered in an originating summons.

The case of **FURSYS (K) LTD VERSUS SYSTEMS INTERGRATED LIMITED T/A SYMPHONY NAIROBI MILIMANI HCCC NO. 1237 OF 2002** decided by Njagi J on the 27th day of April 2004. At page 8 of the ruling line 5 from the bottom there is observation that:

"*In an application to set aside an exparte judgement there are no limits or restrictions on the judges' discretion. The discretion is totally unfettered except that it should be exercised judiciously and that it should be based on such terms as may be just because the main concern of the court, is to do justice to the parties"*

At page 9 of the ruling the learned judge quoted with approval the case of **JESSE KIMANI VERSUS MACCONNEL (1966) EA 547** in which it had been held that some matters to be considered in such applications are the facts and circumstances, both prior and subsequent and all the respective merits of the parties together with any other material factors which appear to have entered into the passing of the judgement which would not or might not have been present had the judgement not been exparte and whether or not it would be just and reasonable to set a side or vary the judgement upon terms to be imposed.

Also quoted with approval was the case of **JAMNADAS SODHIA VERSUS GORDANDAS**

**HEMRAS (1952) 7 ULR11** In which the court, was of the view that, "*the nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered ….. and finally, it should be remembered that to deny the subject a hearing should be the last resort of a court"*

The case of **CRYSTAL MOTTORS (K) LIMITED VERSUS OCCIDENTAL INSURANCE COMPANY LIMITED NAIROBI MILIMANI COMMERCIAL HCCC NO. 91 OF 2007** decided by Warsame J on the 6th day of June 2007, in which an interlocutory judgement though, regular was set aside, because the plaintiff failed to alert the defendant that they would apply for entry of interlocutory judgement upon failure to materialize the negotiations.

The case of **WAWERU VERSUS NDIGA (1983) KLR 238-245**, a court of appeal decision which held inter alia:-

*(i) "Order IXA rule 10 of the CPR empowers the court, to set aside or vary exparte judgement upon such terms as are just and there is no requirement of showing sufficient cause.*

*(ii) In an application under order IXA rule 10 of the CPR*

*(a) The court, has an unfettered discretion to do justice between the parties,*

*(b) It may be just on the facts of the particular case, to avoid hardship or in justice arising from in advertence or mistake even through negligent, but the discretion should not be exercised to assist any one to delay the course of justice*

*(c) The court, of Appeal will not interfere with the judges exercise of discretion unless there has been a misdiscretion leading to a wrong decision or manifestly wrong decision leading to injustice.*

*(d) An application to set aside an exparte judgement made by a defendant may be allowed if the court, is satisfied that the summons to enter appearance were not duly served or that he was presented by any sufficient cause from appearing when the suit was called for hearing"*

The case of **PATEL VERSUS E.A. CARGO HANDLING SERVICES LIMITED (1974) EA 75** where it was held inter alia that:-

*(i) The discretion of the court is not limited"*

On the courts', assessment of the facts herein, it is clear that there is no dispute that the re is in place an interlocutory judgement which the defendant/applicant has moved to this court seeking the intervention of the court. The right to seek the intervention of the court, is anchored on the provisions of order IXA rule 10 and 11 CPR, with rule 11 simply making provision of the mode of procedure, that a litigant needs to use in order to access the relief provided for in rule 10. Rule 10 is the provision of law that Employs the command on setting a side. It simply reads:-

"*Order IXA rule 10:- where a judgement has been entered under this order, the court, may set a side or vary such judgment and any consequential decree or order upon such terms as are just"*

This courts' construction of that rule is that there are three pre-requisites to be met by the litigant namely:-

**(i).** Satisfaction that the judgement complained of had been entered under that provision. The court, finds this satisfied because the request for judgement dated 12th November 2007, and filed on 13th November 2007 was made under order IXA rule 6 CPR.

**(ii).** Satisfaction that the address is made to a court of law. This too has been satisfied in that the application for setting aside has been presented to this court.

**(iii).** The command to the court, is conveyed by the word "May". This court has judicial notice of the fact that construction of the said word by case law that this court, has judicial notice of 15 to the effect that the word denates judicial discretion" This is further supported by the use of the words " as are just"

**(iv).** The action to be undertaken by the court, is to set aside or vary such a judgement.

The yard stick for the exercise of the judicial discretion, donates by the rules is not in built. This has been provided by case law emanating from the court, of appeal and as dutifully followed by the superior court. This established principles provide applicable guidelines. Although this court, has judicial notice of the same and safely apply them here, there is no harm in setting them out in the record. These are:

**(i).** The judicial discretion donated by the rule is not limited.

**(ii).** The court, is enjoined not to fetter itself from the exercise of the said discretion.

**(iii).** The only fetter applicable to the exercise of the said discretion, is that the same has to be exercised judiciously and with a reason.

**(iv).**In relation to setting aside, it meant to be exercised in favour of a party who through in advertence or excusable mistake failed to take a procedural steps leading to the exparte orders being made against the said party.

**(v).** It is never to be exercised in favour of a party who has deliberately sought whether by evasion or otherwise to delay the course of justice.

**(vi).** When determining whether to exercise the same or not, the court, should look at the prevailing immediately before and after the entry of the said interlocutory judgement.

**(vii).** The court, to determine whether the offending judgement fall into the category of regular or irregular judgement.

**(viii).** Where the setting aside of the exparte orders, is being sought with a view to creating an avenue for the other side to be heard, the court, is enjoined to look at the defence being put forward however irregular.

**(ix).** The court, to take note of the guiding principle that denying a party from being heard or as has become to be popularly known, driving a litigant from the seat of justice should be a last resort of any court of law.

These principles have been applied to the rival arguments herein and the court, has made findings to the effect that there is no dispute that indeed summons to enter appearance were taken out and served but the defendant entered in appearance nor filed defence leading to the entry of the said judgement.

The question for determination by this court, is whether the applicant has brought itself within the ingredients warranting this court, to exercise or decline to exercise its discretion. In doing so, the court, has to determine whether this was a regular or irregular judgement. From its judicial notice, this court, is aware that there is now an abundance of case law, on the subject to the effect that a Regular judgement is one which has been properly entered in accordance with the rules, where as an irregular judgement is one which has been entered contrary to the rules. This arise where an interlocutory judgement has been entered in a cause where it is not permisable in law to enter the same as found by Mbaluto J in the case of **EASTERN AND SOUTHERN AFRICAN TRADE AND DEVELOPMENT BANK THE PTA VERSUS CAPTAIN MUSA HASSSAN BULHAN (SUPRA)** in which the learned judge ruled that no interlocutory judgement can be entered in an originating summons.

The foregoing being the case, it is necessary to scrutinize the nature of the claims and then marry it to the provisions of law, dealing with the nature of the claims that are proper candidates for entering of

interlocutory judgement. A perusal of the plaint on record reveals that vide paragraph 3, the plaintiff has averred that he is a protected tenant, of a canteen within the defendant's premises, which the defendant unlawfully closed. By reason of the said unlawful closure he filed a reference NO. BPRT 360 (2004) By reason of that, the plaintiffs seek the reliefs specified in the plaint.

It therefore follows that in order to be protected, it has to fall within the ambit of order IXA ruled 6, under which the request for judgement was made. In order for rule 6 to apply, the plaint must be drawn as mentioned in rule 5 CPR. Rule 5 provides inter alia that:-

"*Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages"* This court, has construed this provision and it is of the opinion that in order for this provision to shield the judgement complained of, it has to be demonstrated that the claims is for pecuniary damages only or for the detention of goods, with or without a claim for pecuniary damages. Herein the plaintiffs' claim is for pecuniary damages and permanent injunction. It does not therefore fall within the ambit of the provision of order IXA rules 5 and 6.

Another issue to be determined by the court, though not raised by both parties, is the jurisdiction of the court, to finally determine a land lord and tenant dispute. This court has judicial notice of the fact that jurisdiction to so determine is within the preserve of the BPRT by virtue of section 4 of the said Act. The superior court, is only vested with jurisdiction on two fronts namely.

1. Statutory jurisdiction limited to appellate jurisdiction donated by section 10 of the parent Act.

2. Case law jurisdiction - This arises from case law, decided by the CA as dutifully followed by the superior courts, that this court, has judicial notice of. It lays down the principle that since an injunctive relief is not one of the remedies that the BPRT has been mandated to give, then, the proper forum for the issuance of such a relief is the high court. The interim relief is meant to provide a temporary reprieve to a tenant threatened with eviction pending determination of the dispute between him and the landlord by the mandated tribunal.

The nature of the relief sought is a matter of consideration. As submitted, proceeding to grant prayer (b), would be tentament to curtailing the freedom of either side moving to exercise their contractual rights to bring that relationship to an end which the law does not prescribe to be a permanent one. Either party has a right to bring it to an end but within the law.

Lastly there is need to comply with the requirement placed on the intended beneficiary of the intended reprieve, where by, he is required to place before the court, the nature of the defence he is going to put forward. Herein although the points on the jurisdiction and nature of the relief have been mentioned in the supporting documents, as well as written skeleton arguments, this court, has not traced a draft defence on the record, even one irregularly filed. The question to be determined is whether by reason of failure to exhibit the draft defence, the defendant is disentitled to the relief being sought. The answer is "NO" because, the failure to exhibit a draft defence not withstanding, the court, is entitled to move on its own under the inherent jurisdiction of the court, to render justice to both litigants. In this courts opinion, ends of justice herein would demand that, one litigant should not be allowed through the legal process to reap that which the law, does not bestow on him. Herein, if the setting aside is not granted, the interlocutory judgement will operate to bestow a benefit to a litigant namely a permanent injunction a relief, or remedy not provided for by the parent Act namely, the landlord, tenants, (shops , hotels and catering establishment) Act cap 301 laws of Kenya. 2ndly having held that the nature of the relief sought by the plaintiff was one which was not a proper candidate for the granting of an interlocutory judgement, as per requirement of the relevant rules, allowing the offending interlocutory judgement to be interfered with, will be tantamount to this court, condoning an illegality which a court of law should not do.

For the reasons given in the assessment this court, is inclined to allow the defendants' application dated 30th June 2008 and filed on the same date for the following reasons:-

1. The nature of the reliefs sought by the plaintiff/Respondent in the plaint, do not fall into the category

of reliefs whereby an interlocutory judgement could issue under order IXA rule 6 as read with rule 5 CPR, because these provisions allow entry of interlocutory judgement where only pecuniary damages or value of detained goods are prayed for. Herein in addition to general damages, a permanent injunction was being sought.

2. By reasons of what has been stated in number 1 above, allowing the interlocutory judgement to stand would amount to this court, condoning an illegality something a court of law should not be permitted to do.

3. Allowing the said interlocutory judgement to stand, would also amount to conferring a jurisdiction which is not vested in this court either by statute or by judicial precedent. The reason being that the parent Act namely cap 301 laws of Kenya confers conclusive jurisdiction to determine issues of disputes arising between a landlord and tenant to the BPRT and not a high court. A high court is only vested with appellate jurisdiction. Original jurisdiction is however donated by judicial precedent emanating from the court, of appeal and as dutifully the superior court for laws by which confers original jurisdiction on to the superior court relating to issuance of an injunctive relief as an interlocutory relief aimed at preserving the status quo pending determination of any issues in controversy raised as concern the landlord and tenant relationship by the mandated tribunal namely BPRT.

4. Permanent injunction is not one of the remedies available to a tenant under a landlord and tenant relationship as per the provision of the parent Act. Allowing this benefit to be bestowed on to the tenant unchallenged, through an interlocutory judgement will amount to bestowing an illegal remedy to a tenant.

5. This court, is alive to the requirement that a party seeking to be heard when approaching the seat of justice as a defendant has a duty to display before the court, the issues he intends to raise. Herein no draft defence has been exhibited. That not withstanding and although, this would have been a reason for disentitling the defendant/applicant, the relief sought in any other case, in this courts', opinion in instances where declining the relief would amount to condoning and shielding an illegality, but would also amount to bestowing to a litigant a remedy not provided for by law and also amount to confirming a jurisdiction on to a court, not donated by either statute or judicial precedent, like in this case, the court, can on its own motion move to set aside the offending interlocutory judgement. In this courts', opinion, this case is one such case where the court, can act on its own motion to set aside the interlocutory judgement.

6. By reason of what has been stated in number 1,2,3,4 and 5 above, the interlocutory judgement entered by the Deputy Registrar on 2/1/2008 be and is hereby set aside.

7. The respondent will have costs of the application because although negotiations were going on, the defendant should have reserved its right to enter appearance and file defence within the prescribed time as soon as the negotiations were over. Had they done so the interlocutory judgement may not have been entered.

8. Allowing the defendant a right to have the matter re opened for them, to be heard, will not prejudice the plaintiff in any way, as they will still have the right to apply to strike out the defence, should the same not be found to be in compliance with the required rules.

9. The defendant will have 30 days from the date of reading of this ruling to file and serve a defence.

10.In default of number 9 above, the plaintiff to move the court, to fix the matter for formal proof.

**DATED, READ AND DELIVERED AT NAIROBI THIS 12TH DAY OF JUNE 2009.**

**R.N. NAMBUYE**

**JUDGE**