REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

(NAIROBI LAW COURTS)

CIVIL SUIT 45 OF 2004

AMIR SULEIMAN…………………….…………PLAINTIFF

VERSUS

ABEDARE SAFARI HOTELS LTD…..……...DEFENDANT

RULING

The facts of the proceedings relevant to this ruling are that the Plaintiff moved to this Court vide a suit against the Defendant dated 23.1.2004 and filed the same date.

According to the Plaintiff the suit properties were being run by Wildlife Lodges on behalf of Block Hotels whose subsidiary is Wildlife Lodges. Wildlife lodges gave the plaintiff a letter of offer to lease the gift shops and residential quarters for gift shop workers on both of the suit properties. The offer fruitfied into a formal lease for 7 years effective first January, 2002.

Along the line during the subsistence of the Plaintiff's lease Block Hotels was placed under receivership making it difficult for Wildlife Lodges to run the suit properties. The receivership ushered in the Defendants who purported to terminate the Plaintiff's lease hence the filing of the suit to forestall the dispossession.

The Defendants put in a defence dated 3rd March 2004 filed on 8th March. According to them they are the Registered proprietors of the suit land on which Treetops Hotel stands and lease holders from (KWS) Kenya Wildlife Services of the land on which Outspan Hotel stands. In their capacity as owners they leased out both properties to Wildlife Lodges at a rental value in the year 1999. Block Hotels was a guarantor to Wildlife Lodges. Wildlife Lodges, fell into areas, and when Block Hotels was placed under Receivership, the lease was surrendered back to the Defendants. They Defendants are strangers to the Plaintiffs sub lease on the basis that Wildlife had no power to sub lease and even if they had any, they would not give a lease beyond their own lease of 5 years. They maintain the purported lease between the Plaintiffs and Wildlife Lodges is null and void. They agree, when they learned of the presence of the plaintiff on the premises, they gave him notice to vacate which notice has expired.

Besides the restraint order in the plaint, the plaintiff sought a declaration that the plaintiff is not and has not become a trespasser, a declaration that the plaintiff is a legal tenant to the sub lease in respect to gift shops, and residential property on all those properties stated in paragraph (a) above and any other or further orders as the court may deem just and fit.

In the prayers of the counter claim the defendant seeks an order of vacant possession of the suit gift

shops, costs of this suit and interest thereon at Court rates, any other better relief that the court may deem fair and just.

The Plaintiff put in a reply to defence and defence to counterclaim dated 22nd day of March 2004 and filed on 23rd March 2004. The salient features for purposes of the ruling is that the Block Hotels, and Wildlife Lodges assured the Plaintiff that they had leasehold rights covering the plaintiffs sub lease period, that the two were the Defendants agents, they held themselves as having authority to do what they did on behalf of the Defendants considering that the two had 21 years of uninterrupted occupation of the premises, that the Defendants have admitted that Block Hotels and Wildlife lodges were their agents, that the Plaintiff maintains that he has made out a cause of action against the Defendants and that the Defendants defence and counter claim seeks unfair enrichment and should not obtain in law.

It is against the foregoing background that the Defendant has filed a Notice of Motion dated 29.7.2005 and filed on 5.8.2005. It is brought under order 35 Rules 1 and 8, Order L rules 2,3 and 12 of the Civil Procedure Rules, Section 3A and 6 3(e) of the Civil Procedure Act Cap.21 Laws of Kenya

prayers relevant to this objection are an order for summary judgment to be entered against the plaintiff/respondent as prayed in the defence and counter claim dated 3rd March 2004 namely:-

(a) An order of vacant possession of the suit gift shop(s)

(b) Costs of the suit and interest thereon at Court rates.

(c) Any other further relief that the court may deem fair and just such as an order for mesne profits of Kshs 21,644.00 per shop from 18th October 2003 till grant of exclusive possession of the shop by the Plaintiff/Respondent to the Defendant/Applicant.

(d) Costs of the application.

The Plaintiffs Preliminary objection attempts to fault that application on two fronts.

(a) The application is incurably defective in that it does not comply with the provisions of the Civil Procedure Act (CPA) and the rules made there under.

(b) The application was not made within the time prescribed by the civil procedure Act and the rules made there under.

In his oral submissions to Court Counsel for the Plaintiff/Objector submitted that order 35 Civil Procedure Rules allows for recovery of land and not possession of land. It is his stand that a recovery of land is not the same as possession of land, that mesne profits cannot be granted by way of summary judgment as evidence needs to be taken to prove that and lastly that since the Plaintiff has filed a reply to defence and defence to counter claim, they cannot apply for Summary Judgment until they apply to strike out the reply to defence and defence to counter claim.

In support of their argument the Plaintiffs' Counsel referred the Court to the case of **BUNDAI COFFEE HULLING FACTORY LTD VERSUS ERIA M. BABUMBA [1963] E.A.613**. In this case the Plaintiff filed a plaint claiming vacant possession of certain premises and mesne profits from December 1, 1962 until possession. The application was made under order XXXIII of Uganda which Counsel argues it is on all fours with our order 35 Civil Procedure Rules. On an application for summary procedure under the said order the court held firstly that under Order XXXIII Rule 2 only debts or liquated amounts arising out of an action for the recovery of land are recoverable and permissible under that order and not possession of land. Secondly that since the amount claimed in respect of mesne profits was unliquadated summary procedure was not applicable and the plaint should be struck out. Further reliance was placed on the holding in the case of **UGANDA TRANSPORT CO.LTD VERSUS COUNT DELA PASTURE [1954] 21 E.A.CA. 163** where the court struck out a plaint improperly

brought under order 33 dealing with summary procedure.

In response Counsel for the Defendant has submitted that the cases relied on by the applicant are Uganda High Court decisions governed by different rules of procedure and they are distinguishable, that the Defendant is rightfully seeking vacant possession of premises held by the Plaintiff who is a trespasser, that mesne profits are properly claimed for under any other relief that the court may deem fit to grant and if the Plaintiff is disputing the figures they should do that at the time of hearing of the application, that existence of a defence which does not raise any triable issues is not a bar to an application for summary judgment. It is their stand that this court has jurisdiction to hear their application, it is within the provisions of law under which it has been presented.

On the law the defence Counsel, relied on Black's Law Dictionary Eighth Edition as regards the definition of possession and recovery. They also rely on the case of **GUPTA VERSUS CONTINENTAL BUILDERS LTD [1978] KLR 83-96** whose holding relevant to this ruling is firstly that "***an application may be made under the Civil Procedure Rules under order 35 rule 1, for Summary Judgment on a debt or liquated demand. Secondly, on the construction of rule 1 summary judgment may be awarded in respect of only part of the amount claimed in the plaint."***

In reply to that submission Counsel for the Plaintiff maintains that they are not disputing ownership which they can get at the end of the plaintiffs' lease. They maintain mesne profits cannot be pursued in Summary Judgment when not pleaded in the main plaint. The application cannot act as a pleading. Further that request for Summary Judgment cannot hold without the Court first of all being asked to strike out the plaint, Reply to defence and defence to counterclaim.

Upon hearing both parties on this application it is clear that from the pleadings of both parties the point of contention is whether the Plaintiff has a valid lease that can be enforced against the defendants. The Defendants content that the Plaintiff does not have a valid claim against them and that is why they have moved to Court to seek Summary Judgment. The Plaintiffs have opposed this move by way of a preliminary objection firstly that the procedure under order 35 Civil Procedure Rule is not available to the Defendant because they are seeking vacant possession which is not covered and secondly mesne profits cannot be claimed as the application is not a pleading and lastly that the Defendant has not asked the court to do anything to his plaint, reply to defence and defence to counterclaim which as long as they stand summary judgment is not available to the Defendant.

The provision of order 35 rule 1 Civil Procedure Rules relevant to the facts of this ruling states

"*35(1) in all suits where a plaintiff seeks judgment for*

(b) recovery of land, with or without a claim for rent or mesne profits by a landlord from a tenant whose term has expired or been determined by a notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the Defendant has appeared the Plaintiff may apply for Judgment…………for recovery of the land and rent or mesne profits'

Applying the ingredients of order 35 rule (1) Civil Procedure Rules to the facts of the preliminary objection, it is clear that there is liberty to apply for Summary Judgment even where the Defendant has appeared. Herein the Summary Judgment application is cemented on the counterclaim. In law the Defendant is the Plaintiff for purposes of that counter claim.

The plaintiff herein put in a reply to defence and defence to counterclaim, so the Plaintiff is to be treated as a defendant to the counterclaim. Despite the presence of the reply to defence and defence to counter claim the law allows the defendant to apply for Summary Judgment. The defendant was therefore within the law when he filed that application for Summary Judgment.

As to whether the application has merit or not is for the court that will hear the application for Summary Judgment. The point of inquiry herein is whether the application for Summary Judgment is proper. The

Rules just states:-

"***Where the defendant has filed a defence the plaintiff may apply***" There is no guidance as to what is to happen to the defence or what the applicant is to pray for. Herein the Applicant has sought Summary Judgment but has not sought any order to have the Plaint, reply to defence and defence to the counter claim struck out. It is the contention of the Plaintiff/Objector that without prompting the Court to strike out the reply to defence and defence to counter claim jurisdiction to allow the application for Summary Judgment to proceed to trial on merit does not exist.

The defence has asked this Court to be guided by the reasoning in the case of **GUPTA VERSUS CONTINENTAL BUILDERS (SUPRA) pg. 93 paragraph (G-H)** where it is stated. "***The general rule, is that leave to defend should be given unconditionally unless there is good ground for thinking that the defences put forward are no more than a sham***"

According to the defence Counsel if the Court understood him well, the parties pleadings namely the Plaintiffs Plaint, Replying to defence and defence to counter claim are on record and if the Court scrutinizes them it will find that the same is a sham and so application for Summary Judgment is proper. The stand of Counsel for the Plaintiff/Objector on the other hand is that the court has to be prompted by the very application seeking Summary Judgment to look at those pleadings and decide whether they can hold or not.

The foregoing being the position the Court has no alternative but to look at the way Courts have dealt with such a scenario in other similar litigations. In the case of **MUGAMBI VERSUS GATURURU [1967] E.A. 196** the Plaintiff filed a liquidated claim. The Defendant filed a defence, Summary Judgment applied for. The Defendant filed no reply to the application but urged the court to consider the defence. The magistrate granted the application and entered Judgment for the Plaintiff but paid no attention to the written defence. on appeal the Court held that "*under order 35 rule 2 of the Civil Procedure Rules revised rules 1948, the court is entitled to consider and should consider the merits of a written defence filed in Court.*"

It is apparent from the Summary of the facts of the cited case that the Plaintiff did not ask the Court to strike out the defence. The foregoing decision is a decision by the High Court of Kenya presided over by Madan J. as he then was. The decision on appeal was based on the Construction of order 35 rule 2 Civil Procedure Rules in operation. Observation on it is found at page 197 paragraph B and it reads "*on an application for Summary Judgment made under Order 35 rule 2 unless a Defendant by affidavit, by his own viva voce evidence or otherwise satisfies the court that he has a good defence on the merits or discloses such facts as may be deemed sufficient to entitle him to defend, the Court may pronounce judgment against him.*"

The wording of the old order 35 rule 2 gave a wide discretion to the court to scrutinize the defence on record and determine whether the Defendant should be given a right to defend or not. The Court could do so on its own motion un invited by either party and this is what the High court confirmed in the **MUGAMBI GATURURU CASE (SUPRA).**

In another case of **TERRAZZO PAVIOURS VERSUS STANDARD JOINERY & BUILDING CO. [1967] E.A. 307** also a High Court of Kenya decision by Mosdell J. as he then was, the Plaintiff filed a claim against the Defendant for Kshs 13,500.00 due for the work done and materials supplied with an alternative claim for shs 14,500.00 on a counter manded cheque. The Defendant filed a defence, setting up a set off and counter claim in excess of the Plaintiffs claim. The Plaintiff filed an application for Summary Judgment and asked the Court to give Judgment in its favour, to refuse a stay of execution and to leave the Defendant to take action by way of cross-suit and attacked the *bona fides* of the Defendants defence. It was held *inter alia* that:-

"*There being insufficient material before the Court for it to be able to assess the bona fides of the defendant's defence and the defendant having an equitable set off and a counter claim the defendant should be given unconditional leave to defend*"

In the case of **GURBAKSH SINGH & SONS LTD VERSUS NJIRU EMPORIUM LTD [1984] KLR 695,** the appellant as a landlord under an agreement let its house to the Respondent as a tenant. The Respondents later moved out of the house allegedly without performing certain implied obligations in accordance with the agreement and the transfer of property Act 182. The appellant subsequently, filed a suit seeking costs incurred for performance of the obligation meant to have been done by the Respondent as tenant. The Respondent admitted the tenancy but denied the obligations claiming estoppel and waiver and asked for the suit to be dismissed. The appellant applied for summary judgment which was dismissed. On appeal it was held *inter alia at holding four(4) that "**An application for Summary Judgment** cannot be allowed or applied in cases where a detailed defence has been filed, as the court cannot ignore the defence filed and proceed with the case by way of Summary procedure."*

In the case of **KENYA HORTICULATURAL EXPORTERS [1977] LTD VERSUS PAPE TRADING AS OSIRUA ESTATE [1986] KLR 705,** the appellant sued the Respondent in the High Court claiming the balance of money payable in respect of goods sold and delivered. In its defence, the Respondent denied being indebted to the appellant and added that if any goods had been supplied to him, he had returned them to the appellant due to a fundamental breach of the contract. The appellant moved the Court for an order that Summary Judgment be entered in its favour under order XXXV of the Civil Procedure Rules and in the alternative that the Respondents defence be struck out under order VI rule 13. The High Court found that the Respondent had shown that he should have leave to defend and dismissed the application. On appeal it was held *inter alia* under holding 1. that "*As a general rule, in order for a defendant to be granted leave to defend all that he has to show is that there is a triable issue of fact or of law and leave to defend will normally be given unconditionally except where a judge considers that there is a ground for believing that the defence is a sham in which case he may exercise his discretion to impose conditions."*

In the case of **TITUS MUIRURI DOGE VERSUS KENYA CANNERS LTD (1982 –88) 1 KAR 759,** the appellant, a director and employee of the Respondent was given possession of a house and some land in one of the Respondents' estate. On termination of the appellants' services the Respondent filed a suit for vacant possession and mesne profits and thereafter applied under order 35 rule 1 for Summary Judgment and for the defence to be struck out. At page 760 paragraph 2 it is noted that Gachuhi J as he then was awarded Summary Judgment to the Respondent but made no order on the second part of the motion. At page 761 paragraph 2 Mr. Muthoga who appeared for the appellant on appeal argued that order 35 rule 1 of the Civil Procedure Rules was not applicable to this case since the defence had not been struck out under order 6 rule 13 and that none of the conditions specified in order 35 rule 1(b) were satisfied.

At page 762 paragraph 2 Hancox JA as he then was quoted with approval the reasoning of Madan JA as he then was in **GUPTA VERSUS CONTINENTAL BUILDERS LTD [1978] KLR 83 at page 89** where he stated "*what happens is that the Court merely does not accept the prima facie issues as genuine. This is exactly the task which the court is required to perform in an application for Summary Judgment"* and then went on to hold *inter alia* with Nyarangi and Platt JJA, Ag JA as they were then that "*the appellant should be given unconditional leave to defendant as triable issues as to rights of occupation of the house were disclosed in this case"*.

The principles established by the above quoted cases two of which are High Court decisions and three by the Court of Appeal all of which are relevant to this Preliminary Objection, is that in an application for Summary Judgment the court cannot and should not ignore to look at the defence whether invited or uninvited.

In fact in two decisions namely the case of **KENYA HORTICULTURAL EXPORTERS [1977] LTD VERSUS PAPE TRADING AS OSIRUA ESTATE) 1986) KLR 705 and TITUS MUIRURI DOGE VERSUS KENYA CANNERS LTD (1982-88) 1 KAR 759,** the applicants had sought Summary Judgment and in the alternative striking out of the defence. The Court of Appeal upheld the High Court's decision to proceed with the prayer for Summary Judgment and make no findings on the second limb of striking out the defence.

Applying this principle to the facts of the first objection in this preliminary objection it is clear that the defendant's application for summary judgment cannot be faulted merely by their failure to seek first striking out of the plaint, reply to defence and defence to counter claim. All that the court seized of that application will be required to do is to take cognizance of order 35 rule 1(1) (b) which reads "*where the defendant has appeared the plaintiff may apply for judgment….for recovery of the land and rent or mesne profits"* and order 35 rule 2(1) which states "The Defendant may show either by affidavit or by oral evidence or otherwise that he should have leave to defend the suit"

These provisions and the authorities cited give the Court that will be seized of the summary application to consider the plaint, reply to defence and defence to counter claim un invited and then decide on the merits whether summary judgment is to issue or not.

There was also issue about the mesne profits. It is correctly submitted by the Plaintiff's Counsel that mesne profits is not prayed for in the counter claim. But there is a claim for any other better relief that the court may deem fair and just. In prayer 2(c) of the application objected to the defendant applicant has sought this prayer "*Any other better relief that the court may deem fair and just as an order for mesne profits of Kshs 21,644/= per shop from 18th October, 2003 till grant of exclusive possession of the shop(s) by the Plaintiff/Respondent to the Defendant/Applicant*". The general rule is that a party is bound by his pleadings. The Defendants' pleading is the defence and counter claim. The interim application has to be cemented on the parent pleading meaning that it can only ask for that which is asked for by the parent pleading. A claim for mesne profits of Kshs 21,64/= per shop from 18th October 2003 till grant of exclusive possession of the shop(s) by the Plaintiff/Respondent to the Defendant/Applicant is a special claim. Order 7 rule 2(1) of the Civil Procedure Rules states " *where the plaintiff seeks the recovery of money, the plaint shall state the precise amount claimed except where the Plaintiff sues for mesne profits, or for an amount which will be found due to him on taking un settled accounts between him and the Defendant"*

When this provision is applied to prayer 2 (c) of the application objected to, it is clear that the portion specifying the amount is not specified in the parent pleading which is the counter claim. It has not been specifically pleaded in the counter claim. What was pleaded is any other better relief that the court may deem fair and just. The special claim has been appended to this further relief in the application for Summary Judgment.

The Court of appeal has provided guidance on what should and should not form part of the claim "*such further and other relief as the Court may deem fit to grant in the case of* ***REX HOTEL LTD VERSUS JUBILEE INSURANCE CO.LTD 1972 E.A. 211.*** In this case the appellant leased a Hotel owned by the Respondent for a term of 20 years from 1955. This lease contained a proviso allowing the appellant to terminate the lease at the end of the first five years. In September 1963 a deed of variation was executed whereby the period of the lease was extended up to August 1970 together with a reduction of rent which took effect immediately. Before the termination of the lease the Respondent gave the appellant a notice that it would require possession at the termination of the lease and the appellant claimed to be a protected tenant under the landlord and tenant (Shops, Hotels and Catering Establishments) Act (Cap.301).

Before the expiry of the lease the Respondent sued for a declaration that the Hotel was not subject to the provisions of the Act and that the Respondent would be entitled to possession after the expiry of the lease. At the hearing (without amending the plaint) which was after the expiry of the lease the Respondent asked for an order for possession, and mesne profits as further relief. The trial Judge granted the declarations sought and also an order for possession and mesne profits stating that the plaint was amended.

On appeal it was held *inter alia* that "*the orders for possession and mesne profits should not have been made*

(a) because these could not have been claimed when the suit was filed and

(b) because such relief was not consequential upon the declaration that the premises were not controlled and that the Respondent would be entitled to possession on expiry of the lease"

Applying this principle to the objection, it is clear that in order for prayer 2(c) of the application for Summary Judgment to be faulted, it has to be shown that that relief was incapable of being claimed at the time the counter claim was filed and secondly it is not consequential to the main relief in the counter claim. In the circumstances of this case the battle is over allegation of a lease in respect of certain portions of the suit property. A lease has a rental value attached to it. The Defendant was and still is in a position to claim rental value of the premises alongside other attendant reliefs. It is also this Courts' finding that a claim of rental value or mesne profits as it is popularly known is consequential to a claim of vacant possession and the recovery of the rental premises. For this reason the objection to prayer 2 (c) of the application for Summary Judgment fails. However as to whether it is properly particularized at an interlocutory stage as opposed to being particularized at the lodging of the counterclaim stage is a matter to be gone into by the court which will handle the application for Summary Judgment. It is enough for this Court just to say that it is a requirement of the law as well as trite law that this sort of claim falls within the category of claims christened special claim which are required to be specially pleaded and proved.

The last objection raised is that since the Defendant seeks vacant possession where as Order 35 rule 1 (b) allows recovery of land that procedure is not available to then. These two terms or words have been defined in Black's law Dictionary Eight Edition.

Possession is defined at pg.1201 and it means **possession** *"The fact of having or holding property in one's power, the exercise of dominion over property. The right under which one may exercise control over something to the exclusion of all others, the continuing exercise of a claim to the exclusive use of a material object. The detention or the use of a physical thing with the intent to hold it as one's own. Something that a person owns or controls".*

Recovery on the other hand is defined at pg.1302 as Recovery "*The regaining or restoration of something lost or taken away. The obtainment of a right to something by a judgment or decree, amount awarded or calculated from a judgment or decree".*

The Plaintiff/Objector relies on the case of **BUDAI COFFEE HULLING FACTORY LTD VERSUS ERIA M. BAMBUBA [1963] E.A 613** to support their stand that Summary Judgment for vacant possession is not available to the defendant applicant. The application for Summary Judgment in the quoted case had been brought under Order 33 Rule 2 of Uganda. The applicant in the quoted case claimed vacant possession of certain premises and mesne profits. The Uganda High Court held that:-

(i) under order 33 rule 2 only liquidated amounts arising out of an action for the recovery of land are recoverable and permissible under the order and not possession of land.

(ii) Since the amount claimed in respect of mesne profits was un liquidated, summary procedure was not applicable and the Plaint should be struck out.

The contents of the Uganda Order 33 rule 2 were not set out in the said case. This Court has not managed to lay its hands on the said order in order to compare those contents with our order 35 Civil Procedure Rules in order to determine whether the same legal position prevails in this jurisdiction. Failure to locate the Ugandan order 33 rule 2 is not fatal to this ruling because the point raised by the Plaintiff objector was considered in the case of **ABDULALI JIWAJI & COMPANY VERSUS SHAMVI HOLDINGS LTD [1989] KLR 319.** In this case the applicant who was a landlord and the Plaintiff in the suit, sought Summary Judgment against the

Defendant for vacant possession of the demised premises without rent as the latter was in dispute.

The Defendant resisted the application contending that the tenancy in issue having been a controlled tenancy prior to the execution of the formal lease, continued to be one, as the period between the date of

its execution to the date of its expiry was less than five years. The Defendant therefore contended that the High Court had no jurisdiction to entertain the suit and the right forum ought to have been the Business Premises Rent Tribunal. At page 324 paragraph 3 Sherridan J. as he then was had this to say "*while I can understand the applicants' anxiety to obtain vacant possession with a prospective lease of shs 4,250/= pm as opposed to a controlled tenancy of shs 1700/= pm, I think that the Respondent has set up a serious triable issue that the applicant may have chosen the wrong forum and that the matter should have been referred to the Rent Tribunal under the Act and that the Respondent should have unconditional leave to defend"*

On the basis of that observation the Court held *inter alia* that "*The Court is not sure if the recovery of land can be divorced from the claim for rent or mesne profits as to do so means ignoring, the word "and" in the last line of rule 1(1) of order XXXV of the Civil Procedure Rules"*

The decision is a decision of the High Court of Kenya sitting in Mombasa. It is a decision by a Court of concurrent jurisdiction and so the same is not binding on this court. This Court is entitled to revisit that provision and arrive at its own interpretation of the said Order. My own construction of the Judgment as derived from the reading of the reasons in the body of the judgment is that the Court leaned heavily on the issue of whether the claim had been filed in the right forum or not and shied away from making a decision on the crucial issue before it namely whether an application for vacant possession is the same as an application for recovery of land. The doubt entertained by the court is unfounded as the provisions of order 35 rule 1 (1) (b) are clear. Claims for recovery of land with or without a claim for rent or mesne profits in the first line relates to claims arising from a landlord and tenant relationship. While those in the last line relate to other claims of recovery of land and rent or mesne profits. No difficulty arises in both cases as the claimant is given a right to elect to seek recovery of land with or without rent and mesne profits.

Coming back to the objection herein it is correct that vacant possession is not provided for in order 35 Civil Procedure Rules. What is provided for is recovery of land. This was the same situation in the **BUDAI COFFE HULLING FACTORY LTD CASE (supra).** The court seized of the matter was also a High Court and the decision is not therefore binding on this Court. The gist of the holding in the Budai case is that since vacant possession is not provided for an action for the same cannot lie. Counsel for the Objector has further urged this Curt to follow the decision in **UGANDA TRANSPORT CO.LTD VERSUS COUNT DELA PASTURE 21 EACA pg 163** where it was held *inter alia* that a judge has no. On discretion to allow a claim to be brought, Summarily if it is not precisely within the terms of order 33 rule 2 Civil Procedure Rules on this basis this Court has been asked to exercise no discretion and read possession in recovery.

The objection will be upheld if this Court arrives at the conclusion that possession is not the same as recovery. As at the time of writing this ruling, the plaintiff Objectors' stand is that he is a tenant by virtue of a lease and the Defendant should recognize him as such. He has no claim over ownership of the said land. The owner of the land is the defendant. The Plaintiff is in the premises which stand on the land owned by the Defendant. If the Defendant were to put in a claim for recovery of land as it is from the Plaintiff then that will be an exercise in futility because he will get it plus the Plaintiff and his (Plaintiffs') interest on it. The only way he can get it minus the plaintiff is through the plea of vacant possession. By vacant possession is meant that the Plaintiff is to give back the premises on the Defendants land minus himself and his interests. When the definition in of possession set out earlier in this ruling is applied to the facts of the current status on the ground as regards the suit property, it is clear that all that the defendant is asking for from the Plaintiff is that he wants to hold the said property to the exclusion of the Plaintiff. This is no different from recovery whereby the Defendant would regain or have a restoration back to them of what had been lost or taken away from them. Should they succeed in their application for summary judgment then they would have obtained a right to vacant possession by a decree through summary Judgment. It is therefore the finding of this court that a plea for vacant possession means one and the same thing with recovery of the land. The word "vacant possession" is employed so that when the Defendant succeeds on that plea he will get the property from the Plaintiff minus the Plaintiff and his (Plaintiffs') interests. If the Defendant had moved to Court to seek recovery of land minus vacant possession, it would have necessitated him to get on order for recovery and then move to court to initiate

proceedings for eviction. The Pleading for vacant possession in the counterclaim is proper and the application for summary judgment is properly cemented on it that being the case the objection that the plea for vacant possession in the application for summary judgment does not lie also fails.

In conclusion the plaintiffs' objection to the defendants application for Summary Judgment fails on all the grounds raised for the following reasons:-

(1) The principles established by the cases quoted by this Court in this ruling two of which are Kenya High Court decisions and three by the Court of Appeal of Kenya, the defendants' application for Summary judgment is proper and has not been faulted by the form in which it is framed because in an application for Summary Judgment it is not necessary to prompt the court to strike out the defence or scrutinize the defence when considering the application for summary judgment. The correct position in law as per the cardinal principle governing such applications is that the Court seized of such an application "must" whether invited or uninvited consider the defence on record. Further, in instances where striking out is pleaded as an alternative prayer, the Court has jurisdiction to ignore the alternative prayer for striking out and go ahead and finally determine the application for Summary Judgment without even making a finding on the alternative prayer for striking out. All that it is required to determine is whether on the facts before it that relief is available to the applicant or whether the right to defend is available to the Defendant.

(2) Prayer 2 (c) of the application has not been faulted firstly because the suit being in respect of rental premises with a rental value attached to them, the value of rent could have been claimed as mesne profits in the counter claim and it is still capable of being claimed as such. Secondly this claim is consequential to the claim for vacant possession as order 35 Civil Procedure Rules allows the applicant to seek vacant possession with or without mesne profits. As to whether it is properly cemmented on the counter claim or not is for the court hearing the application for Summary Judgment to rule on it. It is enough for this Court to say at this juncture that the law requires a claim in an interim application to be properly anchored on the parent pleading before it can be claimed. Secondly that the law requires a special claim to be particularized and specially proved.

3) From the reasoning herein vacant possession means one and the same thing as recovery of land. Vacant possession is the ideal mode of pleading which ensures that when the matter is finally determined between the parties, the successful party will get the property minus the person from whom it is claimed plus his interests (of the person from whom the properly is claimed. If only recovery of land is pleaded the successful party might be obligated to initiate eviction proceedings to get the land minus the person from whom it is being claimed and that persons interests.

4) The Plaintiff/Objector has not in any way been prejudiced by the defendants application for Summary Judgment proceeding as his rights are well taken care of firstly by the principles in the cases cited and secondly by the principle in the case of **VISHVA BUILDERS LTD VERSUS MOI UNIVERSITY [2002] KLR 618** where it was held *inter lia* that where the Plaintiff makes a demand for Summary Judgment the Defendant must demonstrate to the Court that it should have leave to defend the suit. The Plaintiff will have a chance to demonstrate during the hearing of the application for Summary Judgment that he has a right to defend.

The Preliminary Objection is dismissed with costs to the Defendant.

DATED READ AND DELIVERED AT NAIROBI THIS 23RD DAY OF MARCH 2007.

R. NAMBUYE

JUDGE