



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 1242 of 2004**

**DAVID ODHIAMBO OWINO.....PLAINTIFF**

**VERSUS**

**THE BOARD OF TRUSTEES.....DEFENDANT**

**RULING**

The Plaintiff filed this suit against the defendant dated 15<sup>th</sup> November 2004 and filed on 16<sup>th</sup> November, 2004. It was later amended on 11.8.2006 and filed on the same date of 11<sup>th</sup> August, 2006. The salient features of the same is that on 13<sup>th</sup> September, 1999 the defendant offered to sell and the plaintiff accepted. The offer to purchase on a tenant purchase basis all that property known as LR. No. KIT/101/186 G. The initial value of the said purchase price was Kshs 3,800,000.00 later increased by 900,000.00. The Plaintiff was required do pay 10% deposit of the total cost and then pay the balance through agreed instalments. The plaintiff was invited to take possession of the suit property end of 2003 awaiting execution of the formal contract. Following invitation to take possession, the plaintiff in the year 2004 took steps to secure the suit premises from vandalism and contracted a construction company to complete the construction thereby spending a further sum of Kshs 986,766.95. In October 2004 the defendants prepared the much awaited contract but sought to make the same have a retrospective effect in terms of monies due and payable with interest. The defendants breached the terms of the said agreement making the plaintiff suffer loss to the tune of Kshs 470,000.000 being 10% deposit made by the plaintiff and Kshs 986,766.95 being sums spent on construction from 16<sup>th</sup> April 2004 to 10<sup>th</sup> July 2004. In consequence thereof the plaintiff seeks the following orders:-

1. Specific performance of the terms of offer and acceptance by, completion of the suit property to 30% level by completing the storm drainage, perimeter wall along the suit property.
2. In the alternative of such construction is done by the Plaintiffs such expense be deducted from the repayments upon valuation thereof from a registered valuer.
3. A declaration that the tenancy purchase repayment(s) be due from the date of execution of the tenant purchase agreement.
4. Where the said performance cannot be effected payment of the said sum of Kshs 1,456,766.95.
5. Interest on (4) above
6. Costs.

The averments in the Plaintiff are countered by the defence averments firstly in the amended defence and counter claim and defence to the amended plaintiff. The salient features of the same are:-

1. The defendant is the registered proprietor of House Number Kitisuru 186 G.
2. The suit property among others was offered for sale to members of the public through a tenant purchase scheme on 4.10.1999.
3. The plaintiff made an offer to purchase the same, which offer was accepted on 18<sup>th</sup> May 2000 subject to contract and payment of monthly rentals of Kshs 59,203.00.
4. The plaintiff took possession of the said property on 2<sup>nd</sup> December, 2003 or there about but declined to pay the agreed monthly rentals, pay any arrears due or execute the tenancy contract. In consequence thereof the defendant counter claims for an order for vacant possession of the property or is evicted from the suit property, mesne profits at the rate of kshs 59,203/- from the date of possession, dismissal of the plaintiffs claim with costs.

In the defence to the amended plaintiff dated 8<sup>th</sup> September, 2006 and filed on 11<sup>th</sup> September, 2006, the defendant reiterated the contents of their earlier defence and counterclaim and denied the contents of paragraph 9 of the amended plaintiff and more particularly that the defendant has never invited the plaintiff to take possession of the suit premises and that the plaintiff has not expended any money to secure the suit premises against vandalism and if the same was done it remains a frolic or misadventure and the plaintiff first is put to strict proof. That the Plaintiff does not possess any legal or equitable proprietary rights in the suit premises and is undeserving of any reliefs and particularly that the Plaintiff cannot look to the defendant for vindication and lastly that the tenancy purchase agreement was the contemplated contract which the Plaintiff declined to execute.

It is against the foregoing background information that the defendant filed a Notice of Motion under order (35) XXXV Rules 1,2 and 8 of the Civil Procedure Rules seeking orders that summary judgment be entered ordering the Plaintiff to give to the defendant vacant possession of LR.No.KIT/101/186 G forthwith, an eviction order do issue directed to a licenced Court bailiff to evict the Plaintiff and put the defendant into possession thereof.

- 2) An Order for summary judgment to be entered for the defendant against the plaintiff for mesne profits at the monthly rate of Kshs 59,203.00 per month with effect from 2<sup>nd</sup> December 2003 until such time as the Plaintiff gives to the defendant vacant possession of LR No.KIT/101/186 G.
- 3) Costs be provided for.

The grounds in support are set out in the body of the application, supporting affidavit and oral submissions in court. They are a reiteration of the averments in the defence pleadings and the major ones are:-

- 1). The defendants developed property under a tenant purchase scheme among them the property subject of these proceedings;
- 2). They advertised them for sale. The defendant as seller was to construct 30% while the tenant, as buyer was to complete the remaining 70%. It is their stand that the defendant did the 30% required before the intention for offer to purchase as per their annexure SCI.
- 3). That the Plaintiff was one of the applicants. He was successful and he was allocated house No.186 G Kitisuru 30% complete.
- 4). That the Plaintiffs acceptance of the offer of purchase was subject to:

- (a) Payment of monthly installments of Kshs 59,203.00 from the date of possession
  - (b) Signing of a tenant purchase agreement which was to be the document governing the contractual relationship.
- 5). That the defendant took possession of the suit property L.R. No.KIT/101/186 G with effect from 2<sup>nd</sup> December, 2003 since then the Plaintiff has neither signed the tenant purchase agreement or been remitting the monthly instalments.
- 6). That there is no dispute that the suit property belongs to the defendant and in the absence of a tenant purchase agreement duly executed by the defendant and plaintiff and in the absence of the Plaintiff remitting the monthly instalments the plaintiff has no defence, to the defendants counter claim and so this is a proper case for summary judgment both for the suit property and for mesne profits.
- 7). There is no way the plaintiff can resist the defendants counter claim as it concerns an interest in land whose transaction can only be enforced in law if it can be shown that there is a valid contract of sale respecting the same in accordance with the provisions of the Law of contract Act Cap.23 Laws of Kenya

Reliance was also placed on legal authorities namely the case of TRANS NATIONAL BANK VERSUS MOGAKA 1991 KLR 389. In this case the Plaintiff sued the defendant for recovery of certain money allegedly lent him. The defendant denied owing the money or ever having been offered an overdraft by the Plaintiff. The Plaintiff filed an application for summary judgment, attached several documents to the affidavit in support intended to show the defendants indebtedness. It was held *inter alia* that summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the action to do that is to usurp the position of the trial judge.

The court was also referred to a ruling in the case of ORBIT CHEMICAL INDUSTRIES LIMITED VERSUS MYTRADE LIMITED AND R.Y.K. VOHORA, Nairobi Milimani Commercial Courts Civil Case No. 631 IF 1998. AT PAGE 4 of the said ruling Ringera J. as he then was set out principles established by the Court of Appeal on the subject of summary judgment. The first quotation was from the case of **NAIROBI GOLF HOTELS (KENYA) LTD VERSUS LALJI BHINJI SANGHANI BUILDERS AND CONTRACTORS CIVIL APPEAL NO. 5 OF 1997** un reported. In this case the Court of Appeal had laid down the following principle.

*“it is trite law that in an application for summary judgment under Order XXXV rule 1 of the Civil Procedure Rules, the duty is cast on the defendant to demonstrate that he should have leave to defend the suit. His duty in the main is limited to showing prima facie, the existence of bona fide triable issues or that he has an arguable case. On the other hand it follows, a plaintiff who is able to show that a defence raised by a defendant in an action falling within the provisions of order XXXV is shadowy or a sham is entitled to summary judgment”.*

The second quotation is from the case of **INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION VERSUS DABER ENTERPRISES LTD Civil Appeal No.41 of 2000 un reported**. The Principle extracted is *“The purpose of proceedings in an application for summary judgment is to enable a plaintiff to obtain quick judgment where there is a plainly no defence to the claims. And where the defendant’s only suggested defence is a point of law and the court can see at once that the point is misconceived or if arguable can be shown shortly to be plainly un sustainable, the plaintiff will be entitled to judgment. The summary notice of the proceedings should not however be allowed to become a means of obtaining an immediate trial of the action, for it is only if an arguable question of law or construction is short and depends on few documents that the procedure is suitable”.*

In this quoted case the learned judge dismissed the application for summary judgment because the defence raised triable issues.

The plaintiff/respondents answer to the defendants application for summary judgment on the basis of the counter claim is found in the reply to defence and defence to the amended defence and counter claim,

replying affidavit to the application for summary judgment and oral submissions in court and the major ones are that:-

- 1) This is not a proper case for summary judgment because, there are issues that need to go to trial as between the parties named.
- 2) The defendant breached the contract by not constructing the house up to 30%.
- 3) The defendant has failed to show how the plaintiff gained access to the premises when they have not pleaded that he is a trespasser.
- 4) The Plaintiff did not fail to sign the contract. All that he objected to sign was a contract which purports to have a retrospective effect.
- 5) That the cases relied upon all show that where triable issues are raised summary procedure cannot be invoked. It is their stand that the case under review is not plain and obvious to justify invitation of a recourse to a summary procedure.

In response to the Plaintiffs Counsels submissions counsel for the applicant reiterated his earlier submission and maintained that on the basis of failure to sign the contract, and failure to remit monthly rentals, the plaintiff has no basis being on the defendant's property. There is no basis for waiting for a full trial and summary procedure is the appropriate procedure herein.

On the courts assessment of the facts herein it is clear from the guiding principles in the cases earlier on cited herein namely **TRANSNATIONAL BANK VERSUS MOGAKA (1991) KLR 389 supra and ORBIT CHEMICAL INDUSTRIES LTD VERSUS MYTRADE LIMITED AND ANOTHER** Milimani Commercial Courts HCCC NO.631 OF 1998 (unreported) supra, that in order to succeed the applicant has to satisfy the ingredients in order 35 rule 1(1) (a) (b), where as in order to oust the Plaintiffs claim to summary judgment, the defendant has to satisfy the ingredients in order 35 rule 2 (1) (2). Order 35 rule 1(1) Civil Procedure Rule states "*in all suits where a plaintiff seeks judgment for*

*(a) a liquidated demand with or without interest,*

*(b) the recovery of land with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser"*

The claim of the defendant herein based on the counter claim falls under sub paragraph b since the claim is not for a liquidated demand but for recovery of land and eviction.

Order 35 rule 2 states 2(1).

*"The defendant may show either by evidence or by oral evidence or otherwise that he should have leave to defend the suit*

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

The duty cast on the defendant is for him to show the court that he should be allowed to defend the claim, that there is something tangible in his defence or pleading that the court should look at on merit. In this case the defendant will have to show that there is something tangible to go to trial firstly as regards the first head of recovery of land and eviction and secondly on the second head of the recovery of mesne profits from the date of possession to the tune of kshs 59,203.00/= in doing so the Plaintiff who is a defendant to the counter claim which is the basis of the summary judgment application will be relying on his reply to defence and defence to counter claim and claim in the amended plaint. They are validity on record and the court cannot ignore them. The standard to be applied to the defence, put in order for that

defence, to warrant right to be heard on it and deny a claimant, to a right to summary judgment has been set or established in a number of cases which this court proceeds to examine here under.

In the case of **GUPTA VERSUS CONTINENTAL BUILDERS LTD (1978) KLR 83 – 96**. At page 93 paragraph (G-H). 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*”. In the case of **MUGAMBI VERSUS GATURURU (1967) E.A. 196** the Court of Appeal held “*under order 35 rule 2 Civil Procedure Rules the Court is entitled to consider and should consider the merits of a written defence filed in Court*”.

In the case of **TERRAZZO PAVIOURS VERSUS STANDARD JOINERY AND BUILDING CO. (1967) E.A. 307** 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 defendants 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 AND SONS LTD VERSUS NJIRU EMPORIUM LTD (1984) KLR 695** at holding (4) four it is stated “*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 HORTICULTURAL EXPORTERS (1977) LTD VERSUS PAPE TRADIGN AS OSIRUA ESTATE (1986) KLR 705** it was held inter alia 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 ground for believing that the defence is a Sham in which case he may exercise his discretion to impose conditions*”

These latter cases plus the ones cited earlier on in this ruling establish the following principles which this court is to apply to the facts herein in determining whether summary judgment is to be allowed in both heads or one or whether the defendant is to be allowed to defend conditionally or unconditionally on any of the two prayers or both. These are:-

- (1) This court is not to invoke this procedure herein except if satisfied that it is plainly clear that the defendant to the counter claim who is the plaintiff has no defence to that counter claim.
- (2) The court has to guard against invoking the procedure with a view to obtaining what is in effect an immediate trial for the action.
- (3) The plaintiff’s reply to defence and defence to the counter claim as well as the amended plaint should be looked at to determine whether these raises any triable issues on which the Plaintiff/defendant to the counter claim can be allowed to defend.
- (4) When deciding whether summary judgment is to issue or not to issue this court is not to exercise that discretion by a minute and protracted examination of the documents and facts of the action.
- (5) Should the court arrive at a conclusion that the defendant should be allowed to defend, either in one or on both heads of summary judgment, then it has to decide whether the plaintiff defendant is to be allowed to defend conditionally or unconditionally.

Before applying the five mentioned principles to the facts herein it is necessary to identify the strong points of each on which those principles are to be applied. Those for the defendant are:

- (1) The defendant is the owner of the suit property namely LR. NO. KIT/101/186 G.
- (2) That the defendant sought to dispose it off through a tenant purchases scheme where by it the defendant was to construct the property up to 30% while the incoming tenant was to construct the remaining 70%. The 30% construction was to be done before taking of possession by the would be

tenant/purchaser or upon payment of 10% of the purchase price.

(3) They did 30% construction and when the plaintiff took possession of the property 30% construction had been done.

(4) Invitation for purchase was through advertisement. The Plaintiff availed himself of this procedure and on being successful he was allotted the suit property.

(5) That the allotment and taking of possession was subject to signing of a formal tenant – purchase agreement between the parties and remittance of the monthly rentals of Kshs 59,203.00 in the case of the Plaintiff

(6) That the plaintiff took possession but declined to sign the contract which is the basis of the tenant purchase agreement.

(7) That in relation to number 6 above the plaintiff also failed to pay the monthly rentals. On the basis of the above the plaintiff has no business being on the defendants property. The terms of the contract made known to him still stand.

Those for the plaintiffs are:

(1) Agrees the defendant advertised to dispose off its properties among them the suit property through tenant purchase. The Plaintiff applied for one and he was allocated the suit property.

(2) He agrees one of the conditions of the contract was that the defendant constructs up to 30% before the tenant takes possession which was not the case herein and so the defendant breached this condition of the contract.

(3) That he accordingly paid 10% deposit of the purchase price and took possession of the suit property constructed it first upto 30% and then beyond.

(4) Agrees that he was obligated to sign the tenant purchase agreement to complete the contract and also to pay the monthly rentals.

(5) That he declined to sign the tenant purchase agreement because it had been framed in a retrospective manner thus which would have disadvantaged him financially. He offered to sign a contract taking effect from the date of signing or when it was ready for signature.

(6) That he has expended money improving the said property as pleaded to which he is entitled.

When the principles governing summary procedure outlined herein are applied to the points in favour of each side is clear that transaction involving the suit property right from the offer and acceptance up to the taking of possession by the plaintiff, tendering of the tenant purchase agreement by the defendant to the plaintiff and for the plaintiffs signature and the Plaintiff's refusal of signing the same is very central to the case. As at now there is no binding contract between the parties. What exists is an unsigned piece of paper which does not bind either party. The plaintiff seeks specific performance of the same on his terms namely that rentals should start being remitted from the date the contract is signed and not to operate retrospect fully upto the date he took possession of the property since it is the defendants who delayed in availing the same for signature. The defendants insist that if this agreement is to form the basis of the contract binding on the parties then the terms contained therein have to be complied with. The law of contract which this court has judicial notice of is that in order for the contract to be binding there has to be a meeting of the minds. In CHITTY ON CONTRACTS. Thirty second Edition Volume 1 on general principles chapter 1 page 1 paragraph 2 it is stated "*This branch of law differs from most others in one remarkable respect, namely that generally speaking the parties themselves make their own rules as to what shall bind them*". Where parties have disagreed on what should bind them there is no contract and therefore no triable issue. Here in however, the circumstances are such that the binding effect on to the

contract does not begin with the signing of the contract document. It begun much earlier with the offer and acceptance of the offer to purchase. This binding effect continues up to the time of possession. Had this not been the case the defendant would not be demanding the value of monthly rentals from 3rd December, 2003. A question therefore arises as to whether in the absence of the signed tenant purchase agreement, a contract based on implied terms can be inferred to enable the defend to be allowed to defend on the basis of his claim of specific performance which arises as a result of the defendant including a clause or term with retrospective effect, which made the plaintiff withhold his signature. In this courts view this question is to be answered in the negative because specific performance being sought is meant to enforce an interest in land acquirable through contract only. This brings into play the provision of the law of contract Act Cap.23 Laws of Kenya. Section 3(3) of this Act states **“No suit shall be brought upon a contract for the disposition of an interest in land unless:-**

**(a) the contract upon which the suit is founded is**

**(i) in writing**

**(ii) is signed by all the parties thereto; and**

**(b) The signature of each party signing has been attested by a witness, who was present when the contract was signed by such party.**

*Provided that this subsection shall not apply to a contract made in the cause of a Public Auction by an Auctioneer within the meaning of the Auctioneers Act nor shall anything in it affect the creation of a resulting implied or constructive trust”*

The first portion of this section ousts the plaintiff’s claim for specific performance as in ruling otherwise would be to enforce an illegality. The Plaintiff cannot take refuge under the provisos as that can only be interpreted to mean that the resulting or implied trust operate to protect monies that may have changed hands in pursuance of the voided contract. This being the case the plaintiff has no defence to the first request for summary judgment for the recovery of land and eviction.

As for the second prayer for summary judgment for mesne profits at the rate of 59,203.00. This is tied up with the plaintiffs claim for the 10% deposit and the cost of improvements made on the property. Both are special claims. It is trite law that these claims are to be specifically pleaded and proved. Proving means calling for evidence, tendering of documents, cross-examination being done on both evidence and document. This calls for minute and elaborate scrutiny of the facts a task reserved for the trial judge. The trial judge will be called upon to determine whether there is a resulting or implied trust for the money paid under a void contract as 10% and that spent on improvements. The judge will also decide whether the defendant can claim and enforce their right to monthly rental value arising from a void contract. It is also an interest in land. If the Court finds that the plaintiffs claim for monies is to stand as well as the defendants claim for monthly rental value then the issue of set off will arise for determination. If this court were to give summary judgment for mesne profits, the plaintiff will be shut out from participating in the proceedings as summary judgment would entitle the defendant to formal proof which would deny the plaintiff a right to set off. The net result of the foregoing assessment of the facts in respect of the second limb for summary judgment is that the plaintiff has a defence to the defendants counter claim for mesne profits and also can claim set off on account of moneys claimed from the defendant

The two prayers for summary judgment arise from the same transaction. The question to be asked herein is whether the two are severable or they have to stand or fall together. Order 35 rule (1) (b) gives the litigant an option to seek summary judgment for the recovery of land with or without mesne profits. This is a clear indication that the claims are severable. The court can give summary judgment for recovery of land and leave the claim, for mesne profits to go for trial as this is subject to proof. So severing is proper.

For the reasons given above the court makes findings that prayer 1 of the defendants application dated 8<sup>th</sup> June 2005 and filed on 14.6.2005 be and is hereby allowed on the following terms.

- (1). The Plaintiff is given 90 days from the date of this ruling to remove himself together with all his belongings agents and servants or anybody else claiming through him from the suit land L.R. No.KIT/101/186 G failing which he be evicted without further proceedings in court.
- (2). Prayer 2 of the said application is to await trial of the remainder of the claim of both parties.
- (3) The defendant has succeeded halfway and so he will have half costs of the application.
- (4). Costs of the suit on account of prayer 1 to await the final determination of the suit on account of prayer 2.

**DATED, READ AND DELIVERED AT NARIOBI THIS 4<sup>TH</sup> DAY OF MAY 2007.**

**R. NAMBUYE**

**JUDGE**