REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS

CIVIL CASE 353 OF 2005

DR. AGNES REGINA MUREI ABUOM.....PLAINTIFF

VERSUS

ERASTUS AMONDI OKUL.....1ST DEFENDANT

JAMES KENNEDY NYAUNDI.....2ND DEFENDANT

JULIUS AWUOR OWUOR.....3RD DEFENDANT

WILSON OKINDA OKUL.....4TH DEFENDANT

RULING

The background information in this ruling as gathered from the documentation in the record is that one BRIGADIER ALEXANDER KIPNGETICH SITIENEY was at all times the registered owner of land parcel No. LR. NO.209/380 which he had leased to the defendants Respondents who were carrying out a bar and restaurant business in the name and style of Sumner House Resort. The lease was dated 2nd April 2003 and it was to run for a period of five years and three months. During the pendance of the said lease agreement and more particularly on the 2nd day of December 2003 the said Brigadier Sitieney sold the premises to the plaintiff herein at a purchase price of Kshs 12,500.000.00. One of the items there in was that vacant possession was to be given within three months from execution of the sale agreement. The purchase price was Ksh 12,500.000.00 part of which was from M/S Housing Finance Company, Limited (HFCK) in the sum of Kshs 4,500.000.00. Liquidation of the same was to be at monthly remittances of Kshs 109,100/=.

Upon purchase of the suit property in December 2003, the plaintiff required the defendants to leave the premises by July 2004 but they did no leave and so they became trespassers on account of which the plaintiff filed suit seeking an order that the defendants by themselves their servants, agents or any person claiming under them to vacate and or delivery possession of L.R. No. 209/380/7 Hurlingham plus any other relief this Honourable Court may deem fit to grant in the circumstances of this case.

In their defence the defendant/respondents confirmed that they entered into lease agreement with one Alexander Kipngetich Sitieney on 2nd April 2003 for a period of 5 years and 3 months upon conclusion, the same, they defendants undertook considerable improvements to the premises setting a commercial enterprise for catering purposes. It was a term of the said agreement that they to do enjoy the said lease without any interruption from or by the landlord or any persons lawfully claiming in the name of the landlord. They further contended that if the said premises were sold the same was sold with full knowledge of the plaintiff and the said Alexander Kipng'etich Sitieney of a subsisting lease between the

said Alexander and the defendants. Further that even if there is a change in any ownership of the said property, the same does not affect the lease as they were not privy to the sale transaction.

The plaintiff vide an application by way of notice of motion brought under order XXXV rules 1 and 2 of the Civil Procedure rules and section 3A of the Civil Procedure Act dated 21 July 2005 and filed on 22 July 2005 sought summary Judgment to be entered for the plaintiff as prayed in the plaint such other and further orders as it deems just and expedient in the circumstances and that costs of the application be provided for. The application was heard inter parties and a ruling given by Mugo J, on 18th November 2005. the salient features of the ruling are that:-

1) That the respondents have not in their defence included any counter claim as would raise their chances for the granting of leave to defend this suit.

2) That, even assuming that they have an on interest in the suit premises as tenants, such an interest can only derive and subsist upon their fulfilling the terms of the agreement under which their claim can be said to emanate.

3) That the respondents in paragraph 7 of their defence claim to be entitled to a lease of 5 years and 3 months and to have peaceful and quiet enjoyment of the premises.

4) The court's understanding of the law and upon reading of the document relied upon by the respondents was that such enjoyment of the leased property is only open to a tenant who has fulfilled his part of the bargain by the payment of rent and observance of the terms of the lease.

5) The respondents have not rebutted the applicant's claim that no rent has been paid in respect of their tenancy for all that time they have occupied the same after the property changed hands.

6) That to the courts understanding even if the lease upon which they base their defence were to be valid the same disentitled them to the property immediately after the 21 days grace period for the payment of rent.

7) On that account the court agreed with the applicants counsel that the defendant, have no basis upon which to defend the suit as they are clearly trespassers on the suit premises.

8) If they had any right under their agreement between the vendor and themselves in as far as their occupancy was concerned the same extinguished the moment they fell in arrears of rent for 21 days.

9) That no legal right can be presumed to attach to the property at the moment.

10) On that account the court was persuaded that the respondents had no right to remain on the suit premises and that the defence herein had not raised any triable issues as to afford them leave to defend.

On that account the court allowed the application, entered judgment against the respondents as prayed in the plaint. Further considering that the applicant/plaintiff had been denied the use and enjoyment of the suit premises for one year, 5 months now and having demonstrated to the court the existence of mortgage amounting to Ksh.4.5 million in respect of the same the court ordered the defendant/respondents to vacate the premises within the next 15 days failing which they were to pay mene profits for the entire period they have been unlawfully in occupation to the date at which the order will be complied with together with interest at court rates. Further that the said orders were issued in pursuant to prayer (b) of the plaint.

Prayer (b) of the plaint read as "*any other relief this Honourable Court may deem fit to grant in the circumstances of this case*"

Building up on the court's ruling for summary judgment in the courts' ruling of 18th November 2005 counsel for the plaintiff/applicant has come to this court by way of notice of motion brought under section 3 of the civil procedure Act Cap 2 Laws of Kenya

rder L rule I of the Civil procedure rules and all other enabling provisions of the law. It seeks the following orders:-

1) That pursuant to the order of the court the defendants do jointly and severally pay to the plaintiff Mesne profits amounting to Ksh.1,260,000/- being monthly rents at the rate of Ksh.70000.00 per month from 16th June 2004 to 13th December 2005 with interest thereon at court's rate.

2) That in the alternative the Honourable court do order an inquiry as to mesne profits as from 16th December 2005 with interest thereon at court's rates

3) That the Honourable court be at liberty to make such other order in exercise of its inherent panels to meet the ends of justice herein.

4) That the defendants do pay costs of this application.

The grounds in support are set out in the body of the application, supporting affidavit and oral submissions in court which are mainly a reiteration of the contents of the plaint, affidavit in support and the major ones are the following:-

1) That the defendants were to vacate the premises within 15 days from the date the order of Justice Mugo were made on 18th day of November 2005.

2) That since the respondents were supposed to vacate the premises on 3.12.05 but moved out 13.10.05 delaying by 10 days they are liable to pay mesne profits as ordered by the court.

3) The mesne profits to be paid are to be ordered at the same rate of 70000.00 per month the same rate at which the respondents were paying rent to the former landlord who sold the premises to the plaintiff/applicant. The rent as per paragraph 24 of the supporting affidavit is to run from 16th June 2004 to 13th December 2005 to the tune of Ksh.1,260,000/-

4) The mesne profits are based on the rate in the lease agreement exhibited as annexture AR MA 9."

5) That the suit was filed for purposes of eviction only.

6) That correspondence exchanged between counsels and exhibited herein show that the premises were not handed over to the applicant because:-

(i) Keys were not handed over to her but left with the watchman who was not an agent of applicant.

(ii) Items belonging to guests were left in the premises.

(iii) Guests were found in the premises and taken to police station and recorded statements to the effect that they were staying in the guest house under the instructions of Mr. Okul and not the applicant.

7) Commenting on the replying affidavit of the respondent, it is the applicants' stand that it can only apply to the deponent but not to the other respondents as the authority to depone on their behalf has not been exhibited by the deponent.

8) The deponents show that they were not handed over to the applicant in the stipulated time.

9) Statements recorded to police go to show that indeed the court order was not obeyed. Since they disobeyed a court order they have to pay mesne profits.

In response counsel for the respondent relying on the replying affidavit stressed the following points.

1) That after the ruling was delivered the respondents put in place operation procedures to vacate.

2) That, there were proceedings involving the city counsel and items left behind were the subject of criminal case number 1140/05 as shown by annexture EAO2.

3) It is their stand that by 30.11.05 the respondents had removed all the items that they required to remove that which was subject of the court case and this has not been disputed by the applicant.

4) That the keys were left with one Bob Otieno who was a watchen at the premises as there is no dispute that neither the applicant nor her agent had visited the premises to be handed the keys.

5) The court was urged to ignore annexture ARMA 5 and 6 as they are photocopies firstly, and secondly, that there is no statement from the investigating officer to confirm that indeed they carried out investigations following a complaint lodged by the applicant.

6) In response to the applicants submissions that the replying affidavit ought to be struck out because authority to depone on behalf of the other defendants has not been exhibited, the respondents' counsel stated that such a move would be draconian and this court is urged to refrain from resorting to it and instead it should hear the matter substantively as opposed to resorting to technicalities.

In reply to the respondents submissions counsel for the applicant herein found that the replying affidavits is incurable. As such it has to be struck out leaving their application in defended. That annextures 5 and 6 still stand as there is no application to have the same expunged. On the courts assessment of the facts herein, the first issue to be dealt with is the validity of the replying affidavit. It is common ground that it is sworn by the first defendant on behalf of the others. This has come under attack. Reliance has been placed on the case of **RESEARCH INFORMATIONAL EAST AFRICA LTD VERSUS JULIUS ARISI AND 213 OTHER NAIROBI C A 321 OF 2003**. It is a court of appeal decision and so it is binding on this court the issue is discussed from page 7 – 10 of the judgment. The relevant extracts are as follows: At page 8 paragraph 2 it is observed "rule 12(1) of orders I civil procedure rules referred to inter alia permits any one or more of the several plaintiffs to authorize any other of them to appear, plead or act for such other in the proceedings. But rule 12(2) of order 1 emphatically provides"

(2). the authority shall be in writing signed by the party giving it and shall be filed in the case". At page 9 line I from the top it is stated" In our view none of the 214 plaintiffs has any right to take any steps in the suit on behalf of any other plaintiff without an express authority in writing. Thus Julius Arisi cannot take any step in the suit on behalf of all the other plaintiffs including filing a verifying affidavit, unless he has been expressesly authorized by any of the plaintiffs to so act as provided by order I rule 12(1) civil procedure rules. In this case Julius Arisi deposes in the verifying affidavit that he has been authorized by all the co-plaintiffs to swear the verifying affidavit on their behalf and purports to verify the correctness of the averments on the plaint on behalf of all the co-plaintiffs. ……. (line 8 from the bottom) in our respectful view, the learned judge over looked rule 12(2) of order 1 civil procedure rules which requires that the authority if granted should be in writing and signed by the person giving it and, further that such written authority should be filed in the case. In the absence of such a written authority in the case file, the learned judge erred in holding in effect that Julius Arisi had sufficiently verified the correctness of the averments in the plaint with the authority and on behalf of the 2nd to 214th plaintiffs. At page 10 paragraph 2 it is further observed. "In our view the true construction of rule 1(2) of order VII Civil Procedure Rules is that even in cases where there are numerous plaintiff, each plaintiff is required to verify the correctness of the averments by a verifying affidavit unless and until he expressly authorizes any of the co-plaintiffs or some of them in writing, and files such authority in the case, to file a verifying affidavit or his behalf in which case such a verifying affidavit would be sufficient compliance with the rule……..

Having come to the conclusion that the verifying affidavit of Julius Arusi was filed without authority of the other 213 plaintiffs it follows that the other 213 respondents have not complied with the mandatory provisions of rule 1(2) of Order VII Civil Procedure Rules and that their suit was liable to be struck out by the Superior Court under rule 1 (3) of Order VII Civil Procedures.

The superior court however had a discretion. It had jurisdiction instead of sticking out the plaint to make any other application under such giving the plaintiffs another opportunity to comply with the rule."

Applying that reasoning to the facts herein, it follows that without an authority in writing having been annexed to the replying affidavit, the replying affidavit filed is to operate for the 1st defendant only. The other defendants have not responded to the applicant's application. The Respondents Counsel has not sought to avail himself of sub rule 3 by asking for time to comply and so paragraph 2 of the said replying affidavit is struck out. This striking out of paragraph 2 does not give the plaintiff a walk over on her application. She still has to dislodge the responses of the first defendant to her application, making it mandatory for the application to be considered on merit.

Prayer 1 of the application subject of this ruling seeks to benefit from the orders granted under "such further and other relief that the court may deem fit to grant," granted in favour of an application which sought summary judgment for the plaintiff as prayed for in the plaint. Followed by a prayer for the court to make such other and further orders as it deems just and expedient in the circumstances and an order for provision of costs. As also set out earlier on in my ruling, the prayers in the plaint were only three namely vacant possession in prayer (a) any other relief this honourable court may deem fit to grant in the circumstances of this case in prayer (b) and costs of the suit in prayer (c). There is no specific prayer for payment of mesne profits or a liquidated claim as it is known in law in the plaint. The application for summary judgment did not also specifically ask for mesne profits or a liquidated claim. The learned judge granted the relief under the prayer "*any other relief that this honourable court may deem fit to grant"*.

In the current application the claim has now been specified as a mesne profit claim and the amount which is liquidated specifically pleaded. It is clear from the grounds in the body of the application, supporting affidavit and oral submissions in court that the figure is based on the rental value of rent that the respondents used to pay to the landlord who had sold the premises to the applicant. The question that this court has to answer is whether the applicant is to succeed in her claim or not. In deciding so this court has to mind the fact that it is not sitting on an appeal or review of justice Mugo's order. That not withstanding this court is entitled to inquire into the fact as to whether the relief as claimed passess both the technical test as well as the merit test.

The technical test arises as to whether the application is to be treated as uncontested if the respondents replying affidavit is to be faulted as submitted by the applicants counsel. Whether that faulting will give the applicant's application a clean bill of success and this make it to qualify for it to be allowed as prayed, or whether inspite of the faulting of the respondents replying affidavit, the Court has still to go further and inquire as to whether the claim satisfies the pre-requisites for pleading. In other words was it proper for it to be wrapped up in the relief "*any other relief that this court deems just or fit to grant"*.

As to whether the respondent's affidavit has been faulted or not it is clear that there is no dispute that the same has been deponed by one Erustus Amondi Okui. Paragraph 2 of the said affidavit indicates that the deponent is swearing that affidavit on behalf of himself and the other defendants namely the 2nd, 3rd, and 4th defendants. It is deponed that the deponent has authority from these others to depone on their behalf. This authority is not one of the annextures attached to that application. Reliance has been placed on the court of appeal reasoning in the case of **RESEARCH INTERNATION EAST AFRICA VERSUS JULIUS ARISI AND 213 OTHERS, NAIROBI C.A. 321 OF 2003.** At page 8 of the judgment the Court of Appeal set out the requirement of order 1 rule 12(1) (2) of the Civil Procedure Rules. They state

12(1) "*where there are more plaintiffs then one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceedings and in a like manner where there are more defendants than one, any one or more of them may be authorized by any other of them to appear plead or act for such other in any proceedings.*

(2) The authority shall be in writing signed by the party giving it and shall be filed in the case".

On the basis of this provision the Court of appeal in the cited cases ruling dealing with the validity of a verifying affidavit, verifying the plaint on behalf of others, made findings page 9 of the judgment line 7 from the bottom that "*Rules which require that the authority, if granted should be in writing and signed by the person giving it and further that such written authority should be filed in the case*". *The said Court of Appeal went further to rule that failure to comply as above invites the penal consequences in order 7 rules (1) (3) Civil Procedure Rules of having the pleading struck out although the court has a discretion and it has jurisdiction instead of striking out the pleading, it can make appropriate orders such as giving the party an opportunity to comply with the rule. See also the case of* ***GULAM AND ANOTHER VERSUS JIRONGO [2004] 1 KLR 158.*** These two cases concerned a defective verifying affidavit due to lack of authority to depone the same being filed in the case. This court in its own ruling in the case of **SUPERIOR HOMES K LTD VERSUS FIRST AFRICAN (E.A.) LTD AND ANOTHER NAIROBI HCCC NO. 381 OF** 2007 delivered on 3rd day of August, 2007 at page 20 of the ruling extended those provisions to apply to a replying affidavit as well.

Applying that to the facts herein it is clear that without authority to depone being exhibited the replying affidavit filed herein can only hold in so far as the first defendant is concerned. It does not hold for the 2nd , 3rd and 4th defendant. As to whether this will give the applicant a walk over in their claim in so far as it concerns those defendants will depend on whether it passes the next test as to whether it is properly anchored.

As noted earlier on it the start of this assessment it is anchored on the learned judges order in the ruling of 18.11.2005 where she granted it under "*any other relief as the court may deem fit to grant*." Any other relief as the court may deem fit to grant in the application for summary judgment is well anchored on a similar relief in the plaint. As to whether this will suffice to enable the court grant it will depend on what the law says about the standard of pleading of such a claim.

What comprises such further and other relief as the court may deem fit to grant was clarified in the case of **REX HOTEL LTD VERSUS JUBILEE INSURANCE CO. LTD 1972 E.A. 211.** It is a court of appeal decision. In this case the facts are that the appellant leased a hotel owned by the Respondent for a term of 20 years from 1955. It 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 plaint0 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 declaration 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 should not have been made because:-

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

(b) such a 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.

This court in its own ruling in the case of **AMIR SULEIMAN VERSUS ABEDARE SAFARI HOTEL, LTD NAIROBI, HCCC 45 OF 2004** decided on the 23rd day of March 2007 at page 2 ruled that in order for prayer 2 (c) to be faulted it has to be shown that the 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.

Applying the reasoning of the court of appeal in the **REX HOTEL LTD CASE supra** and this courts

own reasoning in the **AMIR SULEIMANI case supra** to the facts herein, it is clear that in order for it to pass the test of it being anchored on any other relief that the court may deem fit to grant it has to be shown that (1) it could have been claimed at the time the plaint was filed and

(b) it is consequential to the main relief in the plaint.

It is common ground that at the time of purchase there existed a lease agreement between the seller as the landlord and the Respondents as tenants. Rent payable was Kshs 70,000.00 monthly. The Respondent has not denied existence of the lease agreement neither has he said that he was not obligated to pay rent to the landlord. It is to be noted that the lease is unregistered. But that does not make it invalid. It is now trite law and a matter of judicial notice and notoriety that the tenancy resulting on an unregistered tenancy is a monthly tenancy and it is valid. The court therefore makes findings that the 1st Respondent and his colleagues were not supposed to stay in the said premises for free. They were to pay rent and they know that the same was payable to the vender who was their landlord.

It is common ground that the applicant purchased the property effective from 2004 the effective date that the courts order said that mesne profits were to be paid. In order for the applicant to be found to have been entitled to rental value of the premises or mesne profits as it is popularly known, it has to be shown that she assumed the status of a landlord from that date of purchase either expressly by a clause in the sale agreement to the effect that the property is sold subject to the lease or that a fresh lease is entered into between the tenants in situ and the incoming land lord/owners or purchaser. There is no new lease herein and so the court has to fall back on to the express transfer of the lease or creation of one by conduct of the parties. The lease agreement was exhibited as E.A. O.1 by the Respondent and ARMA 9 by the applicant. The sale agreement has not been exhibited to the current application but it was exhibited to the application for summary judgment. It was marked as annexture A. Clause 4.7.2 reads.

"The property is sold in vacant possession which the vender is obligated to obtain within three (3) months of completion date. For the purposes of ensuring vacant possession is delivered to the vendors advocate will hold as stake hold the sum of Kshs 1,250,000.00 (one million two hundred and fifty thousands until vacant possession to the purchased".

There is no other clause which shows that the property was sold subject to the lease or in vacant possession. It is apparent that clause 4.7.2. was not invoked. The property was handed over with the tenants in Situ and that is why the applicant came to court to seek their removal.

From June 2004 to 30th November 2005 as put by the Respondent and his colleagues in a period of 18 months. Is it possible that the Respondent and his colleagues can be let off scotch free and be allowed to wriggle out of their obligations just because there is no lease agreement between them and the applicant?. The answer is "No". They were tenants for the vendor. When the property was sold to their knowledge they did not quit but held on. They knew they were to pay rent as they had contracted to do so. They have not exhibited any document showing that they had paid rent for that period. By holding over they became tenants by conduct and the new purchaser their landlord. Had they paid rent to the vendor this court has no doubt that the same could have been transmitted to the applicant since they did not do so it is the finding of this court that the applicant is entitled to recover the same from them.

Having ruled that the applicant became a beneficiary of the rental value from the date of purchase, which rental value the respondent and his colleagues have not made good, a question arises as to whether the same can be allowed as prayed for in prayer 1 of the application subject of this ruling? It should be noted that prayer 1 is not anchored on a plaint but on an application. It is not supported by an averment in a plaint but by deponent in a supporting affidavit, grounds in the body of the application and oral submissions in court.

Order 7 rule 2(1) of the Civil Procedure Rules requires the liquidated demand to be laid in a plaint. The plaintiff which has already crystallized into a decree herein did not demand in prayer 1 in it. Case law has also laid down the required mode of pleading of such a claim. In the case of **KENYA BUS SERVICES VERSUS MAYENDE [1971] 2 KAR 232** it was held that unless special damages are

pleaded the same cannot be proved. In the case of **SANDE VERSUS KENYA COOPERATIVE CREAMARIES LTD CIVIL APPEAL NO.154 OF 1992 (UR)** the holding is that in the absence of specific pleading of special damages such a claim cannot be allowed even if not objected to by the other side. In the case of **COAST BUS SERVICES LTD VERSUS SISCO MURUNGA DANJI AND 3 OTHERS CIVIL APPEAL NO. 1929 of 1992** it was held inter alia that special damages must be pleaded with as much particularity as circumstances permit. In the case of **OUMA VERSUS NAIROBICITY COUNCIL [1976] KLR 297** the holding is that for special damages to be awarded they as must be pleaded and proved.

Applying the foregoing principles to prayer 1 of the application subject of this ruling it is apparent that despite the claim having been granted by Mugo J. under "such further and other relief that the court may deem fit to grant" and despite this court having ruled that it is not sitting on appeal or review of Mugo Js orders, and despite this court having ruled earlier on in this ruling that the claim being consequential to vacant possession could be claimed under such further and other relief's, it is apparent that the claim as presented presents two fundamental issues that this court has to resolve. The first one is the issue as to whether granting the claim under such further and other relief as the court may deem fit to grant satisfies the law as regards the pleadings, presentation and proof of such a claim. The second issue is one dealing with privity of contract arising from the fact that the amount claimed or sought to be recovered arises from a lease agreement between the defendants and the person who sold the property to the applicant.

As regards the first issue, in order to succeed the applicant has to satisfy three ingredients for requirements namely:-

(a) The claim has to be anchored on a plaint.

(b) It must be particularized

(c) Unless allowed a of liquidated claim under summary procedure, either by way of interlocutory judgment or summary procedure the same has to be specifically proved.

Applying these to prayer 1 it is clear that the relief is not anchored on the original plaint herein as the same was not pleaded specifically therein. Neither was it particularized. It therefore follows that granting the said relief under such further and other relief as the court may deem fit to grant does not help because that is not the standard of proof required for such a claim.

Prayer 1 of the applications is not a plaint though it qualifies to be a pleading and so the claim is not properly anchored in it. The standard of proof required for such a claim is not by way of affidavit and annexture but by calling of evidence, tendering of exhibits and cross examination where the claim has not been allowed through summary procedure. Proof of claim in the manner prescribed by law is not possible here as being a prayer in an application the only proof required by law is by examination and scrutiny of the contents of the affidavit and the annexetures which method does not satisfy the standard of proof required for such a claim as shown by case law.

Having ruled that the applicant cannot allow the relief in prayer I as presented, the question arises as to whether she is to be sent away from the seat of justice empty handed, in view of the fact that the plaint herein has already crystallized into a decree. The answer is "NO" there are two ways which she can use to access the relief. The first one is by filing a fresh claim for it. This has a danger of her being exposed to accusations of duplication of suits and abuse of the due process of the law. Issue of Res judicata might also be advanced. Although Res judicata might not hold because issues settled herein as between the parties are those relating to vacant possession but not payment of rent. She might not, however escape accusations of duplication of suits and abuse of the due process of the law as this is a claim which her counsel should have foreseen and slotted it in. If counsel was not sure of the issue of privity of contract as pertains the lease between the vendor and the respondent and his colleagues then he should have joined the vendor to the proceedings to provide that link.

The most convenient avenue is to apply for the decree herein to be vacated as well as the order of

granting mesne profits under such further and other relief as the court may deem fit to grant on account of mistake. The mistake arises because in order for such a relief to be granted it has to be anchored on a plaint be specifically pleaded in a plaint and be proved by adduction of evidence or through summary procedure.

For the reasons given above the application dated 19th May 2006 is refused for the reasons:-

(1) the relief being sought being a liquidated claim could not and should not have been granted under such further and other relief as the court may deem fit to grant as the law as well as case law and practice requires it to be specifically pleaded and proved.

(2) The same cannot be granted as prayed for in prayer I of the application because prayer I is not anchored on a plaint but an application whose mode and standard of proof differs from that required to prove such a claim.

(3) The plaintiff is at liberty to apply for review and setting aside of the order of 18th November, 2005 granting it erroneously in a manner granted as well as the consequential decree resulting there from on account of mistake. Then have the plaint amended to specially plead and thereafter proceed according to law.

(4) Or alternatively file fresh proceedings seeking the same but face challenges of duplication of suits, abuse of the due process of the court and remotely but not inevitably "*Res judicata"*

(5) The proceedings were occasioned by the respondent failures to meet the obligations under the lease so though the application has been rejected costs will be in the cause.

Dated and delivered this 21st day September 2007.

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R NAMBUYE

JUDGE