



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 63 of 2004**

**SUSHILABEN RAMNIKLAL SHAH.....  
.....PLAINTIFF**

**VERSUS**

**VEGETABLE BARGAIN CENTRE LTD**

**T/A GREEN HOUSE RESTAURANT.....  
DEFENDANT**

**RULING**

The defendant was a tenant of .....of the plaintiff on the suit premises known as **LR NO.360 TIGONI ROAD NAIROBI**. It defaulted in rent payment and at the time of filing this suit the arrears stood at Shs.3,400,000/=. The plaintiff filed this suit on 27<sup>th</sup> January 2004 seeking judgment against the defendant for:

- (a) Vacant possession
- (b) Rent arrears of Shs.3,400,000/= up to and including 1<sup>st</sup> November 2003
- (c) Mesne profits at the rate of Shs.90,000/= aforesaid from 1<sup>st</sup> November 2003 until possession is delivered
- (d) Costs and interest at court rates on (b) and (c) above from the date of filing suit until payment in full.

The defendant upon being served with summons entered appearance and filed defence in which it denied the claim and sought the dismissal of the plaintiff suit. On 13<sup>th</sup> December 2004 the plaintiff filed an application under Order XXXV of the Civil Procedure Rules seeking Summary Judgment.

The application came up for hearing before me on 19<sup>th</sup> September 2005 when Miss Mbugua counsel for the plaintiff started her submissions but due to lack of time she did not complete her submissions. The matter was adjourned and stood over to 6<sup>th</sup> February 2006. On 6<sup>th</sup> February 2006 when the application came up for further hearing, she applied for leave to withdraw the entire suit under Order XXIV Rule 1 of the Civil Procedure Rules and informed the court that the plaintiff is ready and willing to pay the defendant the costs of the suit under O.XXIV Rule 1.

Secondly she submitted that she has no counterclaim and the plaintiff cannot be held hostage to continue with the suit if it no longer has interest in it. She further submitted that the plaintiff has already sold the suit premises to a Third Party and any rights over the property were transferred at the time the property was transferred to the said 3<sup>rd</sup> Party. She concluded by saying that she has no instructions from the rightful owner to proceed with this matter.

Mr. Namada counsel for the defendant opposed the application for withdrawal of the suit on the ground that it was an ambush. He submitted that the application is made in bad faith because there are Interim Orders in favour of the defendant and if this application is allowed, the new Landlord will seize that opportunity to evict the defendant from the suit premises. He concluded that the application to withdraw the suit is incompetent and should not be allowed with due respect to counsel if the plaintiff is no longer interested in its suit and applies for leave to withdraw it cannot be stopped. The only remedy for the defendant is costs and since the plaintiff is not willing to pay the defendant the costs of the suit I see no reason to refuse to grant leave.

Leave to withdraw the suit is granted. The plaintiff to meet the costs of the suit. Orders accordingly.

Dated at Nairobi this 13<sup>th</sup> day of February 2006.

**J.L.A. OSIEMO**

**JUDGE**