

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

Civil Case 1324 of 2002

JOHN HARRISON KINYANJUI

t/a J. HARRISON KINYANJUI & CO. ADVOCATES.....PLAINTIFF

VERSUS

KARUNA PROPERTIES LTD.....1ST DEFENDANT

DUNCAN MUGAMBI t/a WRIGHT AUCTIONEERS.....2ND DEFENDANT

RULING

The applicant by way of this Notice of Motion expressed to be brought under Order XXXIX Rule 4 and 8 of the Civil Procedure Rules seeks orders that the Respondent be ordered to pay to the Applicant a sum of Shs.282,408.40 or deposit the said amount in court.

The application is based on the grounds that the Respondent has failed to comply with the order of Alouch, J requiring him to pay all the undisputed rent; that the plaintiff's lease is set to expire on 31st March 2005 and the defendant is apprehensive that he will not pay the outstanding rent before he vacates the premises; that in the interest of justice, it is fair and expedient in all circumstances of the case that the application be allowed.

The application is opposed by the respondent on the ground that the applicant has not demonstrated that the respondent is likely to be unable to satisfy the sum it is claiming in its counterclaim if, and in the event it succeeds in its counter claim.

Counsel for the respondent submits that the applicant seeks to get what is sought in the counterclaim without evidence being subjected to the rigours of cross examination.

In the plaint the sum sought is Shs.382,408/= while in the counterclaim it is Sh.339,204. It is not possible to tell the veracity of the sum claimed.

I agree with counsel for the respondent that the applicant has not met the requirements of Order XXXIX Rule 4 and 8. There is no evidence that in the event the applicant succeeds in his counter claim the respondent will likely be unable to satisfy the award.

The application therefore fails and it is dismissed with costs.

Dated and delivered at Nairobi this 14th day of September 2006.

J.L.A. OSIEMO

JUDGE