



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

**Civil Suit 127 of 2005**

TENDE DRIVE VILLAS LTD.....1<sup>ST</sup> PLAINTIFF

DAVID KAMAU.....2<sup>ND</sup> PLAINTIFF

**VERSUS**

NATIONAL INDUSTRIAL CREDIT BANK LTD.....1<sup>ST</sup> DEFENDANT

CHARLES BOSIRE.....2<sup>ND</sup> DEFENDANT

ESTHER MUBOKA BOSIRE.....3<sup>RD</sup> DEFENDANT

AZIZ MOHAMMED PIRAK.....4<sup>TH</sup> DEFENDANT

**R U L I N G**

Delay in preparation and delivery of this ruling has been caused by my recent illness, hospitalization and long recuperation. The same is regretted.

On 9<sup>th</sup> March, 2005 the 1<sup>st</sup> Plaintiff herein, who was then the only plaintiff, filed this suit by plaint of the same date seeking the following main reliefs against the Defendants jointly and severally:-

**(a) A permanent injunction to restrain them, their servants and agents from evicting the Plaintiff from L.R. No. 3734/1141 and L.R. No. 3734/1143 or interfering with the Plaintiffs' quiet possession thereof.**

**(b) An order canceling the registration of L.R. No. 3734/1141 and L.R. No. 3734/1143 in the names of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, and to vest the two properties in the Plaintiff, or for the status quo to be maintained.**

By consent order entered on 26<sup>th</sup> April, 2005, one DAVID KAMAU was “granted leave to join in the suit as an additional Plaintiff”. He was further granted seven (7) days from the date of the order to “file his papers”. He has subsequently been referred to as the 2<sup>nd</sup> Plaintiff while the original Plaintiff has been referred to as the 1<sup>st</sup> Plaintiff. Together with the plaint the 1<sup>st</sup> Plaintiff had filed chamber summons dated 9<sup>th</sup> March, 2005 seeking temporary injunctive relief pending hearing and determination of the suit. That application was heard on 30<sup>th</sup> May, 2005 and ultimately dismissed on 25<sup>th</sup> July, 2005.

I have not seen in the court record any statement of defence filed by the 1<sup>st</sup> Defendant. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed a joint statement of defence and counter-claim dated 12<sup>th</sup> May, 2005. In the counter-claim they sought an order for vacant possession of, and/or eviction of the Plaintiffs from, the two suit properties, L.R. No. 3734/1141 and L.R. No. 3734/1143. It is common ground that the Plaintiffs did not file any defence to that counter-claim.

The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants subsequently filed an application by notice of motion dated 2<sup>nd</sup> August, 2005 under Order 35 rules 1(b) and 2 of the Civil Procedure Rules seeking the main order that the Plaintiffs be evicted from the two properties. This application is the subject of this ruling. The grounds for the application are:-

- 1. That the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are the registered owners of L.R. No. 3734/1141 (I.R. 96990) with effect from 20<sup>th</sup> September, 2004.**
- 2. That the 4<sup>th</sup> Defendant is the registered owner of L.R. No. 3734/1143 (I.R. 96231) with effect from 1<sup>st</sup> July, 2004.**
- 3. That the Plaintiffs are in possession of the two suit properties.**
- 4. That despite demands the Plaintiffs have failed to yield possession and/or vacate the premises.**
- 5. That the Plaintiffs are not paying any rent to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants and have no tenancy or any other relationship at all with them.**
- 6. That the Plaintiffs' application to restrain the Defendants from evicting them from the suit premises has been dismissed with costs.**

There are two supporting affidavits. The first one is sworn by the 2<sup>nd</sup> Defendant. To it are annexed various documents, including the certificate of title of L.R. No. 3734/1141, sale agreement dated 22<sup>nd</sup> July, 2004 and transfer of the title. The second supporting affidavit is sworn by the 4<sup>th</sup> Defendant. To it are annexed, *inter alia*, the certificate of title to L.R. No. 3734/1143 and transfer of the same dated 30<sup>th</sup> June, 2004.

It would appear that the Plaintiffs never filed any grounds of opposition or replying affidavits to this application. But at the hearing of the same I permitted the 1<sup>st</sup> Plaintiff's learned counsel to address the court in opposition to the application on matters of law. There was no appearance for the 2<sup>nd</sup> Plaintiff; the hearing date had been taken in court on 18<sup>th</sup> October, 2005 in the presence of his counsel.

On 30<sup>th</sup> September, 2005 the 1<sup>st</sup> Plaintiff filed an application by notice of motion of the same date seeking stay of this suit pending hearing and determination of Court of Appeal Civil Application No. NAI/253 of 2005. That application had not been prosecuted at the time of hearing this application. He filed a similar application by notice of motion dated 17<sup>th</sup> October, 2005 seeking stay of this suit pending hearing and determination of Court of Appeal Civil Application No. 279 of 2005. Similarly, that application had not been prosecuted at the hearing of this application.

Mr. Muli, learned counsel for the 1<sup>st</sup> Plaintiff, submitted as follows in opposition to the application. The application is incompetent in that Order 35 rule 1 envisages a situation where a defendant has entered appearance and filed defence. In the present case, he further submitted, the Plaintiffs did not enter appearance to the counter-claim nor file defence to it, and thus there is nothing for the court to strike out. What the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants should have done, further argued Mr. Muli, is to apply for default judgement under the relevant provisions of Order 9A, and thereafter proceed to formal proof. He further submitted that conditions as set out in rules 1(b) and 2 of Order 35 have not been met by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants. Those conditions are, he argued, one, that the suit must be for recovery of land by a

landlord as against a tenant or trespasser. The 1<sup>st</sup> Plaintiff is not the 2<sup>nd</sup>, 3<sup>rd</sup> or 4<sup>th</sup> Defendant's tenant, nor is he a trespasser in the premises. He is in the suit premises by virtue of having been the registered proprietor of the suit premises, and the issue of proprietorship is pending trial. Secondly, Mr. Muli argued, the 1<sup>st</sup> Plaintiff never entered appearance to the counter-claim nor filed defence to it; for that reason the application is incompetent.

Mr. Muli also took the position that the application is incurably defective in that the affidavit sworn in support thereof does not conform to form 3A of Appendix A of the Civil Procedure Rules as there is no disposition that the Applicant verily believes that there is no defence to the counter-claim. In his view this is a condition precedent to the invocation of the summary procedure in Order 35. The application is thus an abuse of the process of the court. Finally, Mr. Muli argued that there are triable issues in the counter-claim, and that this is not a suitable and clear case for summary judgment.

Mr. Kerongo, learned counsel for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants, replied that the conditions under rule 1(b) of Order 35 are not cumulative but independent of each other, and each can stand on its own. He further submitted that as no defence to the counter-claim was filed, and none has been disclosed by affidavit or otherwise, there is thus no triable issue disclosed. He further submitted that it was not necessary for the Plaintiffs to enter appearance in the counter-claim as they are already in the suit. Finally, Mr. Kerongo argued that it was upon the Plaintiffs to demonstrate that they should have leave to defend the counter-claim. They have not done so. They cannot have any defence to the counter-claim, as their remedy lies in damages under section 69 of the Indian Transfer of Property Act (I.T.P.A.).

I have considered the submissions of the learned counsels.

Order 35, rule 1 (1) is in the following words:-

***“1.(1) In all suits where a plaintiff seeks judgment for***

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

***(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, where the defendant has appeared the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.”***

Although in the counter-claim the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants have not pleaded in terms that the Plaintiffs are trespassers in the suit lands, that plea can be strongly inferred from the entire counter-claim. Their case is that having purchased the suit lands they are entitled to possession of the same and the Plaintiffs no longer have any title nor any right to remain therein. It is also trite that a plaintiff need not enter appearance to a counter-claim by dint of the fact that he is already in the suit. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants were thus entitled to bring this application for summary judgment under Order 35, rule 1 of the Civil Procedure Rules. It is to be noted that an application for summary judgment under Order 35 is not the same as an application to strike out defence. A defendant need not have filed defence as long as he has entered appearance. The plaintiff would be entitled to seek summary judgment as long as all the conditions set out in the said rule have been fulfilled. The rule does not require that a defence should have been filed. In the present case the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants were entitled to bring their application for summary judgment notwithstanding that the Plaintiffs did not file defence to the counter-claim. Contrary to the view of Mr. Muli, learned counsel for the 1<sup>st</sup> Plaintiff, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants could not have obtained interlocutory or default judgment under any of the relevant rules of Order 9A.

Mr. Muli also argued that the supporting affidavit does not conform to Form 3A of Appendix A of the Civil Procedure Act in that there is no disposition that the deponent verily believes that there is no defence to the counter-claim. He further submitted that this is a condition precedent to the invocation of the summary procedure under Order 35. In his view the application was thus incurably defective. Indeed

Form 3A of Appendix A suggests that the affidavit sworn in support of an application for summary judgment should contain an averment that the deponent believes that there is no defence to the suit. This to me appears to be merely a suggestion of the drafter of the Form. Sub-rule (2) of rule 1 of Order 35 states as follows:-

***“The application shall be made by motion supported by an affidavit either of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed”.***

That sub-rule contains the requirements of the law as far as an affidavit sworn in support of an application for summary judgment under Order 35, rule 1 is concerned. There is no requirement that the deponent swear that he believes that there is no defence to the claim. An application will not be defective merely because its supporting affidavit does not contain such averment.

Under rule 2 of Order 35 the Plaintiffs can show either by affidavit or by oral evidence or otherwise that they should have leave to defend the counter-claim. No replying affidavit was filed and no oral evidence has been tendered. Have they otherwise shown that they should have leave to defend the suit? In dismissing the 1<sup>st</sup> Plaintiff’s application for interlocutory injunctive reliefs (chamber summons dated 9<sup>th</sup> March, 2005) Azangalala, J. in his ruling dated and delivered on 25<sup>th</sup> July, 2005 made reference two similar applications made by the 1<sup>st</sup> Plaintiff in a previous suit (HCCC No. 92 of 2003). Both were dismissed. A similar application for temporary injunctive reliefs by the 2<sup>nd</sup> Plaintiff in another suit (HCCC No. 1650 of 2000) was also dismissed. Azangalala, J. found that the 1<sup>st</sup> Plaintiff herein had not established a *prima facie* case with a probability of success. He also found that in any event the 1<sup>st</sup> Plaintiff could be compensated adequately in damages. I have perused the pleadings herein. I am of the same view as Azangalala, J. that the Plaintiffs can be adequately compensated by an award of damages should they succeed in their suit. They have thus not otherwise shown that they should have leave to defend the counter-claim, to which counter claim they have not even bothered to file defence.

In the event I will allow the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants’ application by notice of motion dated 2<sup>nd</sup> August, 2005 as prayed with costs. Order accordingly.

**DATED AND SIGNED AT NAIROBI THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2006.**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED THIS 24<sup>TH</sup> DAY OF NOVEMBER, 2006.**