



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL SUIT NO. 38 of 2004**

**1. MWAI'S LIMITED ..... 1ST PLAINTIFF**

**2. ISAIAH MWAI MATHENGE ..... 2ND PLAINTIFF**

**- Versus -**

**BRIDGE-UP CONTAINER SERVICES ..... DEFENDANT**

**RULING**

This is an application for summary judgment brought under Order 35 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. It is premised on the argument that the plaintiffs having served the defendant with a tenancy notice under Section 4(2) of the Landlord & Tenant (Shops, Hotels and Catering Establishments) Act (the Act) terminating the defendants tenancy with effect from 1st February 2004 and the defendant having not opposed the notice or filed a reference to the Tribunal as required by the Act the notice took effect from 1st February 2004 and the plaintiffs are therefore entitled to possession arrears of rent and mesne profits.

The application is opposed by the defendant which has through its director filed a replying and further affidavits in addition to the defence filed earlier on by its advocates. As Newbold P. stated in the case of Zola & Another Vs Ralli Brothers Ltd. & Another [1967] E.A. 691 at p. 694:

“Order 35 is intended to enable a plaintiff with a liquidated claims, to which there is clearly no defence to obtain a quick and summary judgment without being unnecessarily kept from what is due to him by the delaying tactics of the defendant”.

Summary judgments are also entered in other cases where the matter is plain and obvious that there is no sustainable defence. See ICDC Vs Daber Enterprises Ltd. [2000] 1 E.A. 75. Where, however, there is a “reasonable or plausible and bona fide [defence] the judge has no discretion; the defendant is entitled to unconditional leave to defend.” – City Printing Works (Kenya) Ltd. Vs Bailey (1977) KLR 85 at p.88 and Osodo Vs Barclays Bank International Ltd. [1981] KLR 30. If there is even one bona fide triable issue the defendant must be given leave to defend. – Postal Corporation of Kenya Vs I.T. Inamdar & Others Civil Appeal No. 189 of 2001 C.A. And the triable issue or issues are to be gleaned from both the defence and the replying affidavit or affidavits – United Insurance Co. Ltd. Vs Waruinge & Others [2003] KLR 629 following Kirat Singh & Co. Vs P. Mughji (1952) 19 EACA 33.

Is there even one triable issue in this case? As I have already stated the defendant has through its advocates filed a defence and its director has sworn a replying and further affidavits strongly opposing the application. It has in all those pleadings challenged the validity of the tenancy notice. Annexed to the further affidavit are copies of invoices demanding payment of rent. One of those invoices is dated 2nd February 2004 demanding February 2004 rent. That is after the tenancy notice is said to have taken effect. The question which arises from that is whether or not the tenancy between the plaintiffs and the defendant was subsisting as at 2nd February 2004. In my view that is a triable issue.

As I have already said even if there is one triable issue the court has no discretion in the matter and has to give the defendant leave to defend. This being my view of the matter I do not need to deal with the other points raised by Mr. Ndegwa. Consequently I dismiss the plaintiffs’ application with costs.

**DATED and delivered this 20th day of May 2005.**

**D.K. MARAGA**

**JUDGE**