



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT 1347 OF 1996**

**PRIMA LIMITED.....PLAINTIFF**

**VERSUS**

**EAST AFRICA BUILDING SOCIETY.....DEFENDANT**

**VISHVA BUILDERS LTD.....1ST THIRD PARTY**

**MERCANTILE LIFE AND GENERAL ASSURANCE CO. LTD...2ND THIRD PARTY**

**RULING**

This suit was set down for hearing on 25th and 26th April 2005. Prior thereto the Defendant had filed a Notice of Preliminary Objection to be argued at the hearing which notice read as follows:

**“TAKE NOTICE that the Defendant will at the hearing of the case herein argue the following Preliminary Objection:-**

- 1. That the Plaintiffs tenancy vis a vis the Defendant being governed by the Landlord and Tenant (Shops Hotels & Catering Establishments) Act this Honourable Court lacks jurisdiction in respect of prayers (a) and (b) set out in the Plaintiff.**
- 2. That the said prayers be expunged and/or dismissed.**
- 3. That the Plaintiff does not comply with the mandatory provisions of Order VI Rule 8 of the Civil Procedure Rules.”**

With the consent of the parties present at the hearing the Court ordered that the 1st and 2nd points raised would be left for final submissions should the Preliminary Objection be overruled and proceeded to hear arguments on the third objection. It is to the said objection that this Ruling relates.

On behalf of the Defendant/Mr. Sehmi argued that the Plaintiff offended the provisions of Order VI Rule 8 in that it did not particularize the negligence or breach of duty of care on the part of the Defendant to warrant the claim made against it and that in the circumstances the Plaintiff failed to disclose the case to which the Defendant is being called upon to answer.

Miss Kilonzo for the Plaintiff submitted that by denying negligence in paragraph 4 of its defence the Defendant clearly knew its case. The Defendant never requested for particulars and does not deny the tenancy. I accept Miss Kilonzo’s argument that the provisions of Order VI Rule 8 are not to be applied as

strictly as the Defendants would wish the Court to do, seeing that the said Rule in sub rule 2 thereof does provide that the Court may at its own discretion order a party to serve the other with particulars of claim defence or other matter stated in his pleading or a statement in the nature of the case on which he relies.

The present objection having been made at this late hour appears to the Court to be an afterthought as the same does not seem to have been considered when the issues for determination herein were drawn agreed and filed on 7th March 1997. The Defendant admits having undertaken the renovation works albeit through a contractor. Issue No. 5 would seem to take care of the Defendants' objection in that it seeks a determination on

**“whether the Defendant has failed to ensure that the 3rd Party takes all necessary precautions to stop the water leakage, if any.”**

The Preliminary Objection as raised does not in my view pass the legal test of being able to dispose of the entire suit. The tenancy agreement not being disputed there is the presumption that privity of estate is not affected by the contract for renovations and the implied terms of the tenancy as contained in the schedule to the Landlord and Tenants (Shops Hotels and Catering Establishments) Act Cap 301 continue to apply. There being no privity of contract between the contractor and the Plaintiff the best course is to have this matter proceed to hearing in order that all the issues in dispute are conclusively determined.

The Preliminary Objection is hereby overruled and is hereby dismissed. Parties will proceed to take fresh hearing dates at the registry on priority basis. Once set down for hearing this suit must proceed to hearing without any adjournments being sought in view of its age.

Dated and Delivered at Nairobi this 17th day of June 2005

**M.G. Mugo**

**Judge**

**In the present of:**

**Mr. Mogeni h/b for Sehmi for Applicant**

**Miss Kilonzo for the Respondent**