



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

**Civil Case 596 of 2004**

**FRANCIS NJAKWE GITHIARI.....1ST PLAINTIFF**

**NJAMA LIMITED..... 2nd PLAINTIFF**

**VERSUS**

**HON. DANIEL TOROITICH ARAP MOI**

**T/A MOI EDUCATIONAL CENTRE.....DEFENDANT**

**R U L I N G**

This matter came up before the court for Directions.

It is common ground that the Defendant had put forward a Notice of Preliminary Objection to the Plaintiff's application dated 4th May 2005. After giving due consideration to the grounds raised in the objections, the court delivered its Ruling on 21st July 2005, dismissing the same. In the course of the Ruling, the court directed the Plaintiff to exercise an election between proceeding pursuant to Order 6 rule 13, or alternatively pursuant to Order 35 of the Civil Procedure Rules.

On 26th July 2005, the Plaintiffs filed in court, a Notice of Election dated 25th July 2005. By the said Notice, the Plaintiffs elected to pursue their application on the basis of Order 35 of the Civil Procedure Rules. Thereafter, the application dated 4th May 2005 was set down for hearing on 26th September 2005, and was listed before the Hon. Azangalala J.

Once again, the Defendant raised a Preliminary Objection. In response to the said objection, the Plaintiffs' counsel informed the court that there was already a determination on the same. It is in those circumstances that the judge referred the case back to me for further directions.

Mr. Paul Mwangi, advocate, submitted that the issues raised in the Preliminary Objection had already been determined by the court. He therefore asked the court to direct that the substantive application should be heard and determined, instead of the court going over the matters which had been dealt with.

Miss Kilonzo, advocate, responded by saying that the Preliminary Objection dated 26th September 2005 was properly before the court, and ought to be determined before the court can decide whether or not the Plaintiffs' application may be heard. She pointed out that in the objection which the Defendant had filed earlier, the contention was that the application was embarrassing. Subsequent to the determination of that objection, the Plaintiff proceeded to make an election. Therefore, it is the Defendant's contention that whereas the earlier objection related to the situation wherein the application was on the basis of two independent Rules, the current objection was only confined to the conditions stipulated under Order 35 of the Civil Procedure Rules.

It was emphasized that an application for summary judgement invites the court to conduct a summary trial. There were conditions which must be met before the court can go on to conduct such a summary trial, submitted the Defendant. And, in this case, the Defendant was inviting the court to determine whether or not the suit should proceed by way of the said summary trial.

To my mind, the issue as to whether or not the Plaintiffs were entitled to summary judgement is the essence of their application. In other words, if the application fails to meet the benchmarks and mandatory requirements for summary judgement, the application would fail. Similarly, if the Plaintiffs fail to satisfy the court that the application is merited and also that the suit has a legal foundation, the court would dismiss the application.

And again, if the application for summary judgement could only succeed either in the event that the cause of action was for recovery of a debt or that the Plaintiffs' claim was liquidated; and if the Plaintiffs' claim herein did not meet those criteria, the application would fail.

Finally, if Special Damages had to be proved, and thus fell outside the ambit of Order 35, that too would be a ground upon which the application herein would fail.

But, all the points set out in the Preliminary Objection dated 26th September 2005, can only provide the Defendant with an answer to the application. In other words, by canvassing each and every-one of the said points, the Defendant expects to persuade this court that he should be given an opportunity to present evidence to back up his Defence.

To my mind, the best way forward in this matter is to have the application argued in full. When that is done, the Defendant will have every opportunity to persuade the court that the Plaintiff was not entitled to summary judgement. That procedure would not deprive the Defendant of the right to put forward any or all the points set out in the Preliminary Objection.

Accordingly, I now direct that the application dated 4th May 2005 should proceed to hearing. The issues raised in the Preliminary Objection will be available to the Defendant, when he is responding to the substantive application. By utilising this route, the court hopes and expects to do substantive justice without undue regard to rigid technicalities.

Costs of these Directions shall be in the cause.

Dated and Delivered at Nairobi this 8th day of November 2005.

**FRED A. OCHIENG**

**JUDGE**