



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 330 OF 1981**

**DUKE OMBAGI MICHIRA.....APPLICANT**

**VERSUS**

**SAMUEL OBURA OKIRO.....RESPONDENT**

**RULING**

This is an application brought under Order XXXV whereby the plaintiff seeks orders for the recovery of land with a claim of mesne profits as per rule 1 (b) of that order. Both the plaint and the affidavit in support of the application state that the applicant is the proprietor of the suit premises being Nairobi/Block 72/73 Ngei Estate Phase II. The defendant/respondent was given a lease for a term of one year commencing in August, 1979, and was due to vacate the suit premises on July, 31, 1980. When he failed to do so the Applicant in September, 1980 served him with a two months' notice to vacate which also he has ignored necessitating thereby this suit.

The defence alleges that the lease referred to herein-above gave an option to the defendant to renew for a further one year which option was exercised so as to entitle the defendant to remain in occupation until July 31, 1981.

No affidavit has been filed by the respondent in reply to that in support of the motion. At the hearing, however, Mr Kapila for the respondent urged two points in opposition to the application. These were

- a) that the affidavit in support of the motion did not comply with the draft forms 3A and B of Appendix A and consequently the application was bad and ought to be dismissed.
- b) that in any case the Defendant had disclosed in his defence a triable issue and consequently the suit should be permitted to go to hearing.

As to the first point, Mr Oraro submitted that the forms are merely directory and not mandatory as Order XXXV rule 1 covers various different kinds of claims and a suitable affidavit has to be drawn to cover each case. I therefore, reject the preliminary objection.

As to the existence of a triable issue it appears to me that the respondent contends that he is entitled to remain in the suit premises until only July 31, 1981 a matter of another one week or so. No purpose will thus be served by this matter proceeding to hearing in any event. In the circumstances I allow the application with costs and make the following orders:

Order:

1. The respondent to give to the applicant the vacant possession of the suit premises on 31.7.81.
2. The respondent to pay the applicant mesne profits for the suit premises at the rate of Kshs 2,500 per month from February 1, 1981 till July 31, 1981 inclusive.
3. Costs of the application and the suit to the plaintiff/applicant.

**Dated and Delivered at Nairobi this 24th day of July 1981.**

**J.R.O.MASIME**

**JUDGE**