

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 1267 OF 2015

WIDEVIEW PROPERTIES LIMITED.....PLAINTIFF

VERSUS

INVESCO ASSURANCE COMPANY LIMITED.....DEFENDANT

RULING

The Plaintiff brought the application dated 16th February 2016 under Order 36 Rule 1(1) (b) of the Civil Procedure Rules seeking the following orders:

1. Summary judgment for recovery of Flat Numbers D1 and B44 on L.R. 209/4517 (original number 6863/32) known as Fine Diamond Apartments (“the Suit Property”) as prayed in the plaint; and
2. The Officer Commanding Kilimani Police Station to accompany the Plaintiff and offer security in the taking of possession of the Suit Property upon the grant of prayer 1.

The application is premised on the grounds that the Plaintiff is the registered proprietor of the Suit Property having bought it from the Defendant who failed to hand over possession of the Suit Property to the Plaintiff. It states that the Defendant had failed to file a defence. The application is supported by the Affidavits of Joseph Gitau Mburu. The court notes that a defence was filed on 8th February 2016.

The Defendant argues that the orders sought should not be granted since it has filed a defence.

A plaintiff can only apply for summary judgment against a defendant who has entered appearance but failed to file a defence under Order 36 Rule 1(1) (b). This was affirmed by Munyao Sila J. in **James Kipkoech v Hillary Kipkosgei Kiboinet t/a Sweetland Limited** [2014] eKLR and **Elizabeth Torongei & 5 Others v David Kipngetich Soi** [2015] eKLR as well as Fred Ochieng J. in **Stargent Enterprises Limited v Cannon Assurance Limited** [2017] eKLR. The Defendant relied on these three decisions in support of its position.

The Plaintiff relied on **Joseph Odhiambo Moro v Dirk Jozef Marie-Rose Van Bunder** [2011] eKLR in which Okwengu J. (as she then was) entered summary judgment for the Defendant on its counterclaim for the recovery of vacant possession of the Suit Property after finding that the Plaintiff had failed to show a credible defence to the counterclaim. It is noteworthy that this decision was given in an application filed in 2008 when the old Civil Procedure Rules applied before the 2010 Rules came into force.

The Defendant has filed a defence, summary judgment cannot be granted pursuant to Order 36 rule 1 of the Civil Procedure Rules. The application dated 16th February 2016 is dismissed with costs to the Defendant.

Delivered in open Court at Nairobi on 29th June 2017.

K. BOR

JUDGE

No appearance for the Plaintiff & Defendant

Present- Mr. V. Owuor- Court Assistant