AN ANALYSIS OF THE SUMMARY PROCEDURE LAWS OF KENYA AS A WAY OF EFFECTIVE AND SPEEDY CIVIL LITIGATION.

BY

MATUNDURA DENNIS MOKUA MIKE

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SUPERVISOR: MR. SSERUNJOGI NASSER

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DECLARATION

I declare that this thesis is the work of Matundura Dennis Mokua alone, except where due acknowledgement is made in the text. It does not include materials for which any other university degree or diploma has been awarded.

REG NO : LLB/17650/71/DF

SIGNATURE : 

DATE : 28th - 06 - 2011

I certify that I have supervised and read this study and that in my opinion; it conforms to the acceptable standards of scholarly presentation and is fully adequate in scope and quality as a dissertation in partial fulfillment for the award of degree of bachelor of law of Kampala International University.

Name of Supervisor : Mr. Sserunjogi Nasser

Signature : _____

Date : 29/05/2011

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It is a toiling task for one to write a research paper because he has to spend a lot of time gathering the resource materials and incur expenses to produce the work in a copyright form. To achieve this, other people's ideas, criticism and recommendations have to be acknowledged.

I therefore take this opportunity to accept the fact that I am greatly indebted to various writers whose ideas I have borrowed to come up with this work. Where I have done so, I have specifically acknowledged at the footnotes.

I acknowledge the efforts of my supervisor, Mr. Nasser Sserunjogi for reading through my work.

I would also wish to acknowledge Justice Samuel Bosire and Justice John Mwera on their views on the subject matter of this research and who contributed to the production of this dissertation.

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Finally I give credit to the Matundura family members whose moral and material support will forever be appreciated for helping me realize my true potential.

DEDICATION

This work is dedicated to Edward Matundura, my late brother whose dream of becoming a lawyer will live on through me, I also dedicate this work to Thomas and Ascar, my dad and mum respectively together with Yves, Winnie and Linda and Joshua Matundura for their financial support and encouragement which all contributed to my realization of this level of education.

ABSTRACT:

Trial as a rule must precede judgment, under summary procedure instead of trial first and then judgment, there is judgment at once and never a trial. The dissertation is an analysis of order XXXV of the rules of Kenya which deals with summary procedure. The research is mainly going to focus on the efficacy of the order. The order is intended to enable a plaintiff with a liquidated claim to which there is clearly no good defense to obtain a quick and summary judgment without being necessarily kept from what is due to him by delaying tactics of the defendant. This order is intended to guard against wasting the courts time and that of the litigant on the claims that are clear.

This study entails the summary procedure as a way of effective and speedy civil litigation by analyzing its nature and availability to parties to the suit, the conditions that the parties are to satisfy, the courts inherent powers, discretion and jurisdiction in the matter. The scope of this study is of the republic of Kenya; however reference will be made to code of civil procedure of India and practice of England to which Kenya's civil procedure rules are modeled from.

The analysis of the said rules is to ascertain the efficacy of civil procedure and if the rule offers a speedy mode of civil litigation. In the process of analysis I shall see if the process used offers justice in the matter because justice should not only be done but it should be seen as being done.

ABBREVIATIONS:

1. ALL E.R – All England Law Reports.
2. C.A – Court of Appeal Reports.
3. E.A – East Africa Law Reports.
4. EACA – East Africa Court of Appeal Report.
5. Ex. D – Exchequer Division.
6. K.B – Kings Bench Division.
7. K L R – Kenya Law Reports.
8. Q B D – Queens Bench Division.
9. T L R – Times Law Reports.
10. W L R – Weekly Law Reports

STATUTES:

1. Civil Procedure Act Cap 21 Laws of Kenya.
2. Subsidiary Legislation; Civil Procedure Rules under Section 81 of the Civil Procedure Act Cap 21

CHAPTER ONE

1.0 GENERAL INTRODUCTION

Summary judgment antecedents have been traced back to the thirteenth century, and summary judgment finds its modern origins in nineteenth century English practice. The Summary Procedure on Bills of Exchange Act of 1855 was adopted to assist merchants to promptly collect on bills of exchange and promissory notes and to dispense with sham defenses. The emphasis was on liquidated claims. This procedure was designed to assist plaintiffs and expedite litigation which had been slowed down by England's pleading requirements and discovery practices. This practice was later expanded to cover all actions at law, for liquidated or unliquidated claims, except for a few designated torts and breach of promise of marriage[1].

Civil litigation can be expensive and time consuming. The Rules of Civil Procedure were adopted "to secure the just, speedy and inexpensive determination of every action." Summary judgment has been described as the primary procedure used to avoid unnecessary civil trials. Summary shall be rendered forthwith if . . . there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law[2].

Summary procedure is provided under order XXXV of the civil procedure rules of Kenya. This order is intended to enable a plaintiff with a liquidated claim to which there is clearly no good defense to obtain a quick and summary judgment without being necessarily kept from

[1] Wikipedia
[2] ibid

what is due to him by delaying tactics of the defendant. This order is intended to guard against wasting the courts time and that of the litigant on claims that are clear.

1.1 BACKGROUND OF THE RESEARCH PROBLEM

It is common knowledge in our daily life and experience that human behavior tends to prove the fact that whenever a person is required to do something detrimental to his well being he will respond negatively by a show of reluctance or if at all he has to act accordingly he will do so without the seriousness deserved in the said act. This practice is also encountered in the judicial process as far as civil litigation is concerned whereby parties obliged to be involved in this process behave likewise.

In order to ameliorate this problem there was need to develop a code of civil procedure and practice to specify the procedure to be followed in the control of civil litigation as far as the institution, hearing, determination and execution of the decrees arising from these proceedings are concerned. Therefore civil procedure law and practice is as old civil litigation itself, having developed over the years in response to human and economic development and it has had to cope with complexities arising there from to reflect the needs of society at any given moment in history.

The Kenyan civil procedure law is provided in the civil procedure act cap 21 laws of Kenya. This law has had a long historical development right from the pre independence period up to date. As indicated above this law was developed to control the conduct of civil litigation in an expeditious manner hence the need to incorporate rules to ensure the achievement of this goal. Contained in this act are rules covering different areas of civil litigation, one area being

that concerned with summary judgment which is provided for under order XXXV of the said act.

In times of relatively high interest rates and economic depression there may be a strong incentive to a defendant who has cash flow problems to keep his creditors waiting rather than borrow money to pay off the debt at a commercial rate of interest from a bank or money lender. A defendant trader would take delivery of goods and then dishonor cheque or bills of exchange in payment of the amount. In general there is defense to a dishonored cheque. The plaintiff was driven to prosecute his action against the defendant to recover the amount. Shortly before the trial was called the defendant would settle the, he has achieved his objective of an interest free period of credit[3].

Trial as a rule must precede judgment, under summary procedure it is the opposite, instead of having a trial the courts render judgment and there is never a trial. The summary procedure of Kenya is governed by order XXXV which I will examine and attest to its efficacy and expedition[4].

1.2 STATEMENT OF THE RESEARCH PROBLEM

The aim of enacting rules governing summary procedure was to ensure quick and effective redress in liquidated demands where going into the normal hearing of the suit would be a waste of time and undue delay and denial of the plaintiffs claim by subjecting him to extra costs. On the other hand to ensure justice is done there is need to ensure that this procedure is

[3] Civil procedure in Uganda by ssekaana
[4] ibid

not misused by being invoked arbitrarily by the plaintiffs in order to harass the defendant who may have a cause to defend. There must be a balancing of interests of both parties.

The issue is whether order XXXV provides sufficient mechanism to ensure a speedy and effective procedure in civil litigation in the areas it specifically covers. Courts have given varied interpretation of these rules in their endeavor to give effect to their practice. It is upon this foundation that it is necessary to undertake an examination of the said rules and determine whether or not they answer question as posed in the dissertation topic.

1.3 SCOPE OF THE STUDY

1.3.1 SUBJECTIVE SCOPE:

This study entails the summary procedure as a way of effective and speedy civil litigation by analyzing its nature and availability to parties to the suit, the conditions that the parties are to satisfy, the courts inherent powers, discretion and jurisdiction in the matter. Recommendations shall be made where there is a lacuna in the order providing for summary procedure in order to make it more efficient and finally a conclusion to see whether the order achieves the aims intended.

1.3.2 TIME SCOPE:

There will be a brief history of civil procedure in Kenya as regards summary procedure from its inception in 1895 and in the early 1913's, then a brief account of the re arrangement of the rules drafted in 1924 and brought into force in 1927. The study will also traverse the timeline and give a brief account of the reforms made in the rules to date.

1.3.3 GEOGRAPHICAL SCOPE:

The scope of this study is of the republic of Kenya; however reference will be made to code of civil procedure of India and practice of England to which Kenya's civil procedure rules are modeled from.

1.4 OBJCTIVES OF THE STUDY:

The objective of this study is to give a clear understanding and analysis of the civil procedure of Kenya in light of summary procedure as provided for in order XXXV of the civil procedure rules of Kenya. The analysis of the said rules is to ascertain the efficacy of civil procedure and if the rule offers a speedy mode of civil litigation. In the process of analysis I shall see if the process used offers justice in the matter because justice should not only be done but it should be seen as being done.

1.5 RESEARCH QUESTIONS/HYPOTHESIS

The question I shall ask myself throughout the research is whether the aim of summary procedure is achieved. In trying to achieve this aim I shall bear in mind the following:

Availability of the procedure to the litigants in the suit. Who is supposed to take advantage of this procedure, what must this individual fulfill in order to take advantage of this procedure, is there any discretion exercised by the courts to these ends, what are the conditions that both the plaintiff and the defendant must achieve in order to advance their aims, are the safeguards sufficient so that the plaintiff does not use this procedure to harass the defendant and are the

safeguards sufficient to ensure that the defendant does not delay the courts time with sham defenses.

1.6 SYNOPSIS:

Chapter two shall deal with the nature of summary procedure and its availability to parties to a suit. This chapter will bring out the historical and theoretical basis of summary procedure and proceed to examine which of the parties to a suit may invoke such proceedings and under which circumstances.

Chapter three will talk about the conditions to be satisfied by the parties to the proceedings. This chapter concerns itself with the conditions as set out in the rules which an applicant must satisfy in order to obtain summary judgment. It will also look at what the defendant may show in order to obtain leave to defend and lastly examine the courts exercise of discretion in favor of either of the fore mentioned parties.

Chapter four will evaluate the efficacy of summary procedure under the civil procedure act. It will be a complete appraisal of chapter two and three and it will try to confirm whether the aims of summary procedure have been achieved or not.

Chapter five will give recommendations and possible reforms that the order should undergo in order to fill the lacuna if any, and a conclusion will be drawn out to legitimately assert my position whether summary procedure is a speedy and effective way of civil litigation.

1.7 LITERATURE REVIEW:

Langan[5] is of the view that summary procedure provides a means by which a plaintiff at an early stage of the proceedings, try to obtain judgment in his claim or part of his claim without going to trial. Thus the scope of this order is aimed at providing procedure for obtaining summary judgment without proceeding to trial actions in the actions specified[6]. Langan's views and thoughts will be a great feature in the research.

The administration of justice constitutes the touchstone of quality of justice enjoyed by members of a civilized society. For the administration of justice is the lifeblood of a civil legal system of any country and at the same time it is also the lifeline of it citizens to acquire justice.[7] This author's writings will aid in analyzing the topic at hand.

Immense literature by different authors such as Richard Kuloba, sir Jacobs and eminent persons such as Lord Diplock will be used, analyzed and interpreted to formulate this research.

1.8 RESEARCH METHODOLOGY:

1.8.1 DOCUMENTARY REVIEW:

The researchers used secondary data content analysis. Using this method, writings of leading scholars, publicists and law reports were reviewed. . In this respect, I was not responsible for the collection of original data but only analyzed conclusions and findings of the authors.

[5] Civil procedure by Langan and Lawrence
[6] Mclardy v Slateum (1890) 24 Q.B.D
[7] Civil procedure and practice in Uganda by m ssekaana

1.8.2 FIELD RESEARCH:

The only research tool used in this field was: Interviews.

The method used in this study was qualitative/key informant interviews. The only interviewee was a court appeal judge, justice Bosire whose views were acknowledged in the research.

Content analysis helped me to identify, enumerate and analyze occurrences and developments in the civil procedure in Kenya.

CHAPTER TWO

THE NATURE OF SUMMARY PROCEDURE AND ITS AVAILABILITY TO PARTIES TO A CIVIL SUIT

2.0 INTRODUCTION:

As earlier indicated, this chapter will be divided into various parts for purposes of clear and distinctive issues which arise there under. To start with I will give a brief historical and theoretical basis of summary procedure rules in the civil procedure act cap 21 of the laws of Kenya.

2.1 HISTORICAL AND THEROETIOCAL BASIS OF SUMMARY PROCEDURE.

In order to grasp the history of summary procedure in Kenya, it is necessary to study the history of the civil procedure act as a whole because at its initial stage the rules of the summary procedure were contained in the act under specific sections as opposed to the current situation where they are provided under a specific order made under the act..

Since Kenya was a British colony it is evident that most of its law is derived from English law. Britain as a colonial master had many colonies it exported its laws to govern the citizen of those colonies. One such colony is India and it had a lot of influence on Kenyan law since Kenya was connected through the Indian Ocean trade. Due to this influence, Kenya had to adopt much of the English law as exported to India and then brought to Kenya through trade relationship. Indian officials were used by the sultans of the Kenyan coast in the administration of justice due to their vast experience under the British Empire which later had to leave a considerable Indian flavor on a large section of Kenya legal framework,

personnel, the administration of justice, the framing of constitution guarantees and laws of procedure[8].

Owing to home politics of colonizing more countries, the British reached the east African market and acquired African wealth through the foreign office in London via India to the sultan. The middleman was the consul paid by the foreign office. The consulate was set up in Zanzibar in 1841 and a consular civil court was set up in 1865.

The administration was not concentrated at the coast alone. During later years it was extended to the mainland through the imperial British east African company, a body initially set up to trade in the east African region. Whereas the law of England was to be applied to British subjects, the imperial British East Africa Company introduced the penal code and the civil procedure code. This was due to close trade and political relations between Zanzibar and India. So when the British government began to directly administer Kenya in 1895, the Indian influence on the legal framework was rooted.

The initial drafting of the civil procedure ordinance was directed in 1895 and in the early 1913 by the chief justice at the time, CJ R. W Hamilton. He adopted as a basis for the compilation of the local ordinance, the Indian code of civil procedure act V of 1908 because procedure under the Indian code had been in force for some sixteen years in Kenya. However its enactment was delayed until other modifications were made to it.

This revision was done by Hamilton and in 1916 he introduced the rules of English pleadings in the high court. It should be noted that this was a landmark year for summary procedure

[8] Judicial hints on civil procedure by Richard Kuloba

because Hamilton extended summary procedure application from actions on negotiable instruments only to actions for the recovery of a liquidated amount of the prevailing English order XIV in actions on specially endorsed writs. Prior to this summary procedure action were restricted to negotiable instruments only. The reason was because negotiable instruments normally specify the amount one is claiming from the defendant. For example if a person issues another with a cheque for final payment and settlement of a debt, and the cheque is dishonored by the bank then it is easy for the claimer to prove the amount claimed as stated in the cheque by simply tendering the cheque before the courts as evidence in summary proceedings. A cheque is an example of a negotiable instrument.

At long last this revised draft was enacted in 1924, in regards to making civil procedure; the ordinance was set up the rules committee to make the rules relating to civil courts. However the ordinance was enacted without the rules. The rules committee rearranged the rules of civil procedure of England and was brought into force in 1927. The basis of the rules was largely on the English model, summary procedure being taken from the English order XIV.

The civil procedure act and the civil procedure rules as originally conceived have remained almost intact save that they have undergone various amendments, in most cases the amendments have been affected to bring the rules in line with the English rules[9].

Having gone through the historical background of summary procedure, it would be prudent to know the theory behind having such rules in civil procedure law. In order to look at this it

[9] Ibid, pg 14

is necessary to look at the nature and meaning of summary procedure before proceeding to look at its aims.

The civil procedure act does not give a statutory definition of summary procedure. For this reason the only available definitions are those provided by different authors and those expressed by the courts in their effort to interpret the provisions under order XXXV of the civil procedure rules (hereinafter referred to as o. XXXV and the rules respectively).

Langan[10] is of the view that summary procedure provides a means by which a plaintiff at an early stage of the proceedings, try to obtain judgment in his claim or part of his claim without going to trial. Thus the scope of this order is aimed at providing procedure for obtaining summary judgment without proceeding to trial actions in the actions specified[11]

As stated above the courts have had opportunity to specify the meaning and aims of summary procedure. In the case of JACOBS V BOOTHS DISTILLEYR COMPANY[12], Lord Halsbury had this to say about summary procedure:

"*The effect of order 14 is that upon the allegation of one side or another, a man is not permitted to defend himself in court; that his rights are not to be litigated at all. There are things too plain for argument; and where there were pleas put in simply for the purpose of delay; which only added the expense and where it was not in aid of justice that such thing should continue, order 14 was intended to put an end to that state of things , and to prevent*

[10] Civil procedure by Langan and Lawrence
[11] Mclardy v Slateum (1890) 24 Q.B.D
[12] (1901) 85 L T

sham defenses by defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who are endeavoring to enforce their rights".

This illustration clearly shows what summary procedure is all about. The principle which underlies o.XXXV is that where a defendant has no arguable defense at all or no defense other than damages, the plaintiff should be entitled to save time and money by having summary judgment awarded against him[13]. This will ensure that suits are determined expeditiously and that justice is not delayed.

It is not disputable that litigants must have reasonable expedition in conducting their cases. It is in public interest that litigation should not be protracted unduly and it should be brought to an end[14]. It is the object of summary procedure to prevent the unreasonable obstruction by a defendant who has no defense or a defense that is a sham. As Lord Bromwell said in the case of RAY V BARKER[15]:

"Courts of law and for common law especially, are not only for purposes of litigation....I think this order was intended to facilitate the operation of the high court of justice in debt collecting; but it should not be applied because it simply exists , but should be applied most carefully and only in very clear cases".

This means that apart from courts being the custodian of litigation they have other functions which they ought to perform hence the need to be empowered to dispose off matters in which there is clearly no arguable defense without wasting a lot of time for themselves and the plaintiff and the increasing of costs for the litigants.

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[13] Langan p 61
[14] Ibrahim Abdel Rahman v Hussein Ibrahim civil suit No 1 of 1973 (Mombasa)
[15] (1879) 4 Ex D 279

The Kenyan approach to the theoretical basis of summary procedure was captured in the dictum of the late Justice Chesoni in the case of RICHARD H PAGE V ASHOK KUMAR KAPOOR[16] where he said that

"the basis for the application for summary judgment under O.XXXV rule 1 is that the defendant has no defense to the plaintiffs claim and the purpose of this procedure is to enable the plaintiff with a liquidated claim to which there is clearly no defense to obtain quick and summary judgment without being unnecessarily kept from what is due from him by delaying tactics of the defendant".

From this dictum it can legitimately be asserted that the theory behind summary procedure is to enhance speedy litigation, but the issue is whether this can be achieved without occasioning any injustice to the party opposed to it. This is so because a plaintiff may use this procedure to get information that the defendant may use in the trial if the summary judgment goes in favor of the defendant. The defendant will swear an affidavit showing that he has a defense or cause to defend and in doing so will aver the facts he will rely on. This will help the plaintiff in his case because he will cover all points to shatter the defense to be raised. In order to curb this mischief the order provides for mechanisms which can preempt its occurrence. Liberty to invoke order XXXV has been given to the plaintiff but to limited instances.

[16] (1979) K L R 249

2.2 AVAILABILITY OF SUMMARY PROCEDURE TO THE LITIGANTS.

In order to achieve justice for both parties to a suit the courts should aim at the application of summary procedure by the plaintiff and the protection of the defendant against undue harassment. There is need to address this question because the usefulness of this procedure as a means of disposing off cases which are virtually uncontested has a result in its extension from time to time to wider classes of cases which may work at the detriment of the defendant.

It is for this reason that the rules provided for who should invoke summary procedure and the circumstances under which it should be invoked. Order XXXV provides that:

"In all suits where a plaintiff seeks judgment for -

(a) A liquidated demand with or without interest; or

(b) The recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser,

Where the defendant has appeared the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits"[17].

From this provision it is evident that the rules give the plaintiff alone the power to invoke summary procedure. The defendant cannot make an application for summary judgment unless he has a counter claim against the plaintiff in which case he may be treated as a

[17] Order XXXV r 1 (1)

plaintiff. It is also evident that there are certain minimum standards or preliminary requirements which must be fulfilled by the plaintiff before he qualifies to make an application under order XXXV.

The first of these requirements is that the defendant must have entered an appearance to the suit in question. An application under order XXXV can only be made after the defendant has been served and he has entered an appearance in the action[18]. However an application for leave to sign judgment need not necessarily be made before the defendant has in ordinary course, delivered his defense and the mere fact that he has filed a defense should not act as a bar to summary procedure. But in cases of such situation the defendant must explain to the satisfaction of the court the reasons as to the delay. Therefore the wording in rule one precludes an application under order XXXV only before a defendant has entered an appearance. If there is no appearance then judgment in default of appearance should be sought under the same order. If there are more that one defendant, the application under order XXXV the order can be made against such of them as appear without waiting for service or appearance of the other or others. Service to the defendant is a condition precedent to an application by the plaintiff under this order.

In RICHARD H PAGE V ASHOK KUMAR KAPOOR[19], the plaintiff applied by notice of motion for summary procedure in the suit against the defendant. At the hearing the defendant raised a preliminary objection that a defense has been filed and the plaintiff for summary judgment in due time. Counsel for the plaintiff argued that the only condition precedent to

[18] Langhan p 52
[19] (1979) K L R 249

the filing of an application for summary procedure is that the defendant must have appeared otherwise there is no limitation as to when the application may be made. Justice Chesoni had the occasion to state the law as follows;

"*It is a preliminary requirement that the defendant must have appeared. This is so because if the defendant has not made an appearance then there is no need to go for summary judgment but the plaintiff may apply for judgment in default of the appearance. There can be no imputation of a requirement that such an application must be before the pleadings have closed or before the defense or reply to the defense has been filed. The purpose of summary procedure is for the plaintiff to realize what is his, so the application should be made immediately the condition precedent has been fulfilled and any delay in making the application should be explained*".

The practice is to the effect that there is no limitation as to time of making the application only that any delay should be explained to the satisfaction of the court. If it were that no application could be entertained after close of pleadings then the defendant would close the door to the plaintiff by filing a defense with a memorandum of appearance where there is no need to reply to the defense. This practice would cure the mischief intended to be cued by order XXXV.

The second preliminary requirement is to do with the remedy sought by the plaintiff. The rules provide that the action should be one for a liquidated demand. Langhan[20] gives exceptional instances where summary procedure cannot apply and they are as follows:

[20] Civil procedure by Langan and Lawrence

1. An action which includes a claim by a plaintiff for libel, slander, malicious prosecution, false imprisonment or sedition.
2. An action which includes a claim by a plaintiff based on allegations of fraud.
3. Certain proceedings for specific performance for the sale or purchase of property, for rescission of such agreement.

The first instance deals with a tort claim and the second and third instance deals with claims basis on contract which in both cases could be for unliquidated demands.

Justice Bosire reveals that the reason for limiting summary proceedings to liquidated demands as being that such proceedings are intended for a quick recovery of liquidated demands and if they are unliquidated demands they will defeat its purpose because there shall be no to go into the hearing of a suit to determine the damages. This is because such proceedings involve trials based on affidavits and the question of damages cannot be assessed in this manner without calling witnesses to prove the extent of damages to be awarded[21].

This is why these proceedings are restricted to actions for the recovery of land with or without a claim for rent or mesne profits. This is because in the case of land a claim for its recovery can easily be proved by production of necessary title documents. Likewise mesne profits can be easily calculated based on the period the claimant has been deprived of the same. Likewise the rent for use of land can be determined basing on the fixed rate and taking into account the period of default of payment. However in order to recover the rent the

[21] Views of justice Samuel Bosire (court of appeal judge)

plaintiff should be in a position to that the relationship of landlord and tenant exists between him and the defendants,

In the case of GULABRAI KANDUBHAI DESAI V ABDULA KHAN s/o JIWA[22] it was held that summary procedure cannot be invoked by a mortgagee under a simple mortgage as the relationship of landlord and tenant does not exist. The plaintiff applied under order XXXV that judgment be entered, there being no defense to this action which is for principal and interest due under a mortgage and for sale of the premises as default of payment. A simple mortgage exists without delivering possession the mortgagor binds himself personally to pay the mortgagee money, and in default the mortgagee shall have the right to cause the mortgage property to be sold. In English mortgages the relationship of landlord and tenant is created by the mortgage deed. Therefore the court was of the opinion that the suit was not covered under order XXXV, the relation of the landlord and tenant not having arisen and therefore the application to enter final judgment could not be entertained. The rationale behind establishing the existence of tenant and landlord relationship is that where such a relationship has been created then both parties are bound by the conditions there under and it is prudent that the tenant does not deny his obligations to pay the rent where the term of the tenancy has expired due to his forfeiture or breach of covenant or the tenancy has been legally determined by the landlord. The tenant should not be allowed to deny the landlord his rent after he has enjoyed the fruits of the relationship through prolonged litigation which are frivolous and vexatious from the landlord's point of view.

[22] (1932) K L R

Having looked at the instances that a plaintiff can invoke summary procedure it should be noted that there are other instances that summary procedure is applicable under the act. One such instance is when the high court is empowered to summarily dismiss an appeal under section 78 B of the civil procedure act. According to Kuloba[23] where a judge considers that there is no sufficient ground for interfering with the decree appealed from he may dismiss such an appeal summarily. However that power should be sparingly used and only in the clearest cases such as an appeal based entirely on facts raising no question of law and not where the memorandum of appeal raises substantial grounds such as that adverse possession was a prescriptive right and that the district magistrate was wrong in failing to hold that the appellant had acquired title by virtue of his long and undisturbed possession of the suit land.

In interpleader proceedings the rules made to govern such proceedings provide for summary procedure in that the court may with the consent of both claimants or on the request of the any claimant, if having regard to the value of the subject matter in dispute, it seems desirable to do so, dispose of the merits of their claims and decide the same in a summary manner and on terms that are just[24]. Summary disposal is the course most commonly taken in straightforward cases particularly when expedition is desirable as for example when the goods may deteriorate but if the goods are of considerable value and difficult questions of law may arise summary disposal is not appropriate even if the parties consent.

The foregoing analysis gives an examination of the provisions as to the nature and meaning of summary procedure and its availability to the plaintiff. However the other issue to be

[23] Judicial hints on civil procedure by Richard Kuloba
[24] Order XXXIII r 5

determined is whether the civil procedure rules are conclusive or exhaustive in their provisions to the extent that a plaintiff cannot obtain the ends through summary procedure in situations not provided for under order XXXV. This leads us into an examination of the courts inherent jurisdiction (powers) as provided for in the civil procedure act.

2.3 THE COURTS INHERENT POWERS VIS – A – VIS SUMMARY PROCEDURE

The question to be addressed here is whether the court can at its own motion invoke summary procedure to determine a case before it in areas not provided for under the rules. According to justice Kuloba[25] the civil procedure act does not purport to be exhaustive save for matters specifically dealt by it. The act thus provides;

"Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court"[26].

Accordingly the absence of any provision on any particular matter does not mean that the court has no power to act in regard to the matter. It is a rule of construction of a statute that every procedure is to be taken as proscribed unless it is provided for but should proceed on the opposite principle that any procedure is to be understood permissible until it is shown to be prohibited by law[27].

[25] Judicial hints on civil procedure by Richard Kuloba
[26] Section 3 A civil procedure act cap 21
[27] Judicial hints on civil procedure by Richard Kuloba

Thus the act and the rules are not exhaustive of all forms of procedure necessary to be used in the administration of justice. They are exhaustive as regards the matters with which they expressly deal but on matters which they are silent. The fact that specific procedure or rule is provided cannot operate to restrict the courts inherent powers. Thus the court can grant other orders on matters not dealt with in the provision for the ends of justice.

The issue then becomes whether a plaintiff can invoke the inherent powers of the court under section 3 A to obtain summary remedy where such a case fails under instances specified under order XXXV for ends of justice. I have not come across a case that relates order XXXV with section 3A however the relationship is argumentative. The case im going to quote can give an understanding because it shows the relationship of section 3A with other orders and for arguments sake it may be argued that the principle used in that case can relate section 3A to order XXXV. In the case of AHMED HASSAN MALJI V SHIRINBHAI[28], an ex parte judgment was given for default of appearance of the applicant. The respondent did not enter appearance or appear at the hearing. She made an application under order XLVII rule 11 of the Indian civil procedure rules for a review of judgment. The order deals with review of judgment by courts. Sir Ralph Widham C.J said

"*I am only concerned for the purpose of this application what remedy if any is open to her to obtain the redress she seeks. Her application would if I consider, would be such of a nature as at least to establish sufficient cause for setting aside order IX rule 13 if the application has been made under that rule. Her possible alternative would be to invoke inherent jurisdiction of this court. Can the applicant then invoke such inherent jurisdiction as vested in this court to make such orders as may be necessary for the ends of justice or to prevent the abuse of the*

[28] (1963) E A 217

process of the courts? Before deciding this point it is necessary to see whether any remedy was open to the applicant. I have already said that the grounds adduced in support of this present application would have afforded a sufficient cause for that purpose under order IX rule 13, that being so the applicant cannot invoke the courts inherent jurisdiction since another remedy is available to her".

From this dictum it can be clearly discerned that where a specific procedure is given it should be followed and the applicant should not rely on the inherent powers of the court to obtain a remedy where an alternative one is provided. Every applicant seeking summary judgment should strictly apply as provided under order XXXV and should only rely on section 3A to cure the defect in the hearing of an alternative to the provisions of order XXXV.

However it should be noted that sir Windham expressed his views which were that there is no rule of law that inherent powers cannot be invoked where another remedy is available. According to him courts will not normally exercise their discretion where a specific remedy is available. The high court is a court of unlimited jurisdiction except so far as it is limited by statute, and the fact that a specific procedure is provided for by the rules cannot operate to restrict the courts jurisdiction. Therefore for some reason this limitation is no longer available. In essence as Windham stated an applicant can invoke the courts inherent powers if the rules do not provide a remedy.

At this point it is good to note that section 81, which gives powers to make the rules and it says that these rules shall not be inconsistent with the provision of the act. Surely if we are satisfied that the effect of the rules construed in a particular way would result in injustice,

then provisions of section 3A and section 81 that rules should not be construed in such a manner.

CHAPTER THREE

CONDITIONS TO BE SATISFIED BY THE PARTIES IN SUMMARY PROCEEDINGS:

3.0 INRODUCTION:

Having examined the nature of summary procedure and its availability to the parties to a suit it is necessary to look at the conditions which the applicant in such proceedings has to satisfy in order to obtain judgment. This chapter also seeks to look at what the defendant can prove in order to obtain leave to defend the suit. I also intend to analyze the courts discretion when granting leave to defend.

Although there are instances when a plaintiff may invoke the provisions of order XXXV, there are limitations to its application. For this case when a court receives such an application there are several options open to the court which it may take. According to Langhan[29] when the application comes before the court it may proceed to do one of the following;

I. Dismiss the plaintiffs application
II. Give judgment for the plaintiff.
III. Give the defendant leave to defend the action.

As earlier stated in chapter 1 the aim of order XXXV is to enable a plaintiff to obtain judgment in a quick manner if he can prove his claim clearly and if the defendant is unable to set up a bonafide defense or raise an issue against the claim which ought to be tried. However it should be noted that when part of the claim is clearly due to admission, the judge should enter judgment for the amount due and admitted upon and give leave to defend as to the residue.

[29] Civil procedure by Langan and Lawrence

The Kenyan practice has shown that most summary judgment applications must be contested especially if filed in the high court. According to Justice John Mwera[30] the reason behind the contesting of these applications is the quantum of claims involved. High court cases usually involve vast amount of monetary claims such that no defendant would accept judgment being entered against him without contesting the suit. It should however be noted that the quantum of damages is not a matter of issue of procedure in such applications although it is the reason why most applications are contested in the high court.

Legal practice requires that any application to a court should have legal basis upon which it is based on. The issue then is whether a defendant to a summary application has a legal provision upon which he made his application for leave to defend. Order XXXV provides that

"The defendant may show either by affidavit or by oral evidence or otherwise that he should have leave to defend the suit"[31].

It is upon the provision that a defendant bases his application for leave to defend.

The foregoing background shows the need for the law to provide safeguards against the plaintiffs would be arbitrary invoking summary procedure by placing conditions upon him to be satisfied before he obtains judgment. At the same time it provides for the defendant with legal basis to oppose such applications if he can show a good cause. I now proceed to examine the conditions to be met by parties to such proceedings.

3.1 CONDITION TO BE SATISFIESD BY THE PLAINTIFF

[30] Views of justice john Mweru (high court judge)
[31] Order XXXV r 2 (1)

Before a plaintiff successfully obtains summary judgment against a defendant he must have satisfied the requirement of procedure and practice under the law. Order XXXV provides that the manner of application shall be by notice of motion supported by an affidavit either of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed[32]. The summons together with the supporting affidavit and any exhibit referred to in the affidavit must be served on the defendant not less than seven days[33] before the day of hearing the summons. These provisions are concerned with what the plaintiff must do when he invokes summary procedure.

The Supreme Court practice is to the effect that an application under this order should be supported by an affidavit which complies with the requirements of verifying the facts and contain a statement of the deponent's belief that there is no defense to the claim or part thereof in respect of which the application is made. This is a strict limitation since it requires a plaintiff not to proceed under this order in every case in which this procedure may be appropriate but only on the ground that the defendant has no defense to a particular claim or part of it. It thus should be used only in proper cases and should not be employed for tactical purposes.

Indeed Lord Vangham Williams stressing on the requirement of affidavit by the plaintiff in the case of SYMON AND CO V PALMERS STORES[34] was of the view that;

"For my own part I cannot doubt that the framers of the rules intended that the affidavit so required should be a condition precedent to the exercise of power conferred by the order to

[32] Order XXXV r 1 (2)
[33] Order XXXV r 1(3)
[34] (1912) 1 K B

give judgment without trial. It no doubt may often happen that the affidavit which fails to satisfy the requirements of the order because the deponent cannot swear positively to the facts therein stated may produce upon the minds of the judge who hears the case, a strong impression that, although the affidavit is not one which satisfies the terms of the order, it none the less indicates a strong possibility that the plaintiff has a good cause of action. The plaintiff however in order to obtain a judgment without trial must have complied with the terms of the order".

Lord Williams in this case then went ahead to explain why it has been conditional for a plaintiff to make an affidavit of the nature therein mentioned. He said that a plaintiffs legal advisor may advise him that although there is not much prospect of his getting judgment under this order, the defendant will probably get unconditional leave to defend but he may swear an affidavit in answer to an application in which he will have to disclose an oath the defense he is going to set up and that may be a great assistance to the plaintiff at the trial[35]. If such a case is taken then it is a manifest abuse of the process of the courts. It is therefore necessary that the jurisdiction given under order XXXV be made conditional upon the making of an affidavit of the nature stated.

Due to the seriousness of the above requirement it is then necessary that the facts therein stated in the affidavit be clearly verified. The verification may be made by reference to the facts stated in the claim. The affidavit need not set out all the particulars nor verify the facts except by reference to the claim even if they have been added by amendment. The affidavit

[35] Symons case supra

should only allege the necessary points to be relied on by reference to the original pleadings or any amendment thereon.

Normally affidavits contain a statement as to the belief and information of the deponent as a means of swearing to the issues alleged therein. This then raises the question as to wither it is the applicant only who can swear to the facts stated in the affidavit. Supreme court practice in relation to this issue is to the effect that statements of information and belief enables such affidavits to be made by the solicitor of the plaintiff on information obtained from instructions and correspondence and the documents, or by a manager or other person employed by the plaintiff who has first hand information or knowledge of the facts. Order XXXV is very clear on this point as it allows some other person who can swear positively to the facts verifying the cause of action and the amount claimed[36]. By analogy the same principle applies in Kenya where other competent person can swear on behalf of the applicant. Such a person may include an advocate or any other recognized agent in law who can swear on behalf of the plaintiff.

There are situations where defective affidavits are filed by the plaintiff and the law should devise a method of resolving such situations. It was stated in the case of LES FILS DREYFUS ET CIE SOCIETE ANONYME V CLERK[37] that the court has jurisdiction to allow a defective affidavit filed in support of a summons under the order to be supplemented by a further affidavit and the defect could be cured by such an affidavit. Similarly in the case of BRITISH EAST AFRICA CORP. LTD V SHAH GOVINDJI LADHA[38] it was held that a

[36] Order XXXV r 1(2)
[37] (1918) 1 ALLER 459
[38] (1938 – 1939) 18 K L R

defective affidavit may be cured by a supplementary affidavit. Here the plaintiff company applied for summary judgment under order XXXIII which was a predecessor to the present order XXXV by motion based on an n affidavit of its agent which failed to disclose that the facts therein stated were true to the deponent's knowledge and that the deponent was authorized to make the affidavit. On these points being taken by the defendant in his affidavit the plaintiff filed a further affidavit which was in accordance with the form prescribed for affidavits grounding such motion. However in a later case of AZIZ V SOUTH British INSURANCE COMPANY[39] the court was of the view that only one affidavit is envisaged in such applications. However judicial opinion is to the effect that it is desired that if a supplementary affidavit be put in, the leave of court should be sought[40].

As expounded in British E.A CORPORATION V SHAH[41] if the courts require further evidence it has the power to call for it. That is the inherent power of the court and it would be an alarming proposition if the court could not do this if it had to decide solely on the original affidavit which is defective. The court will grant the plaintiff leave file a supplementary affidavit which will cure the defect in the original affidavit hence the courts exercise its inherent jurisdiction to the ends of justice.

There is no doubt that where the plaintiff satisfies the conditions of the law and practice as discussed above, then he will be entitled to summary judgment. However there are instances where the plaintiff will fail to satisfy these requirements. Where he fails to do so the court may proceed to dismiss the application. However where part of the claim is clearly due by

[39] (1965) E A 66
[40] Suleiman v South British Ins Co Ltd (1956) E A C A 66
[41] (1938 – 1939) 18 K L R

admission or otherwise, while the defense is shown as to the residue the judge would order judgment for the sum due and give leave to defend as to the residue. There are reason as to why an application may be dismissed as a whole. According to Langan[42] dismissal may be either for two reasons: that the case is not within the order at all, or that it appears to the court that the plaintiff knew that the defendant relied on a contention which would entitle him to unconditional leave to defend. The case is outside the purview of the order if it does not involve a liquidated claim, recovery for land, rent and mesne profits. On the other hand the power to dismiss where the plaintiff knew of an arguable defense bars those who would want to use the order improperly, for example trying to discover what defense the defendant will raise.

On dismissal of an application for summary judgment under order XXXV the defendant will be allowed to file a defense and the case will proceed to the hearing in the usual manner. However before the defendant obtains the leave to defend he must have satisfied the court by meeting the necessary requirements as will be discussed in the following pages.

3.2 LEAVE TO DEFEND BY THE DEFENDANT

As earlier indicated the defendant may show cause to defend and be entitled to leave to defend. Application for leave to defend is premised on the provision of order XXXV which are to the effect;

[42] Civil procedure by Langan and Lawrence

"The defendant may show either by affidavit or oral evidence or otherwise that he shall have leave to defend the suit"[43]

The order further provides;

"Any set-off or counterclaim may entitle the defendant to defend a suit to the extent of such set-off or counter claim"[44].

These provisions give two situations when a defendant can be entitled to leave to defend, that is where he has a set off and a counterclaim.

Langhan[45] states that the ground on which leave to defend may be granted is that there is an issue or question in dispute which sought for some other reason to be tried. The statement that 'there ought for some reason' enables the court to grant leave to defend even though the defendant cannot point to a specific defense on which he proposes to rely. It appears the reason for this is for the ends of justice. The order is plain and straight forward and should not be used for tactical purposes. So even where the court cannot perceive an arguable defense but the circumstances of the transaction are such that it ought to be scrutinized with care then the court should grant leave to defend.

It should be observed here that a defendant may show cause to defend in the ways specified under the order that is by affidavit by oral evidence or otherwise which in my opinion enables the court to grant leave even where the defendant fails to disclose in his affidavit that

[43] Order XXXV r 2 (1)
[44] Order XXXV r 2 (2)
[45] Civil procedure by Langan and Lawrence

he can raise a defense. However the Supreme Court practice[46] gives two ways in which a defendant may show cause against the plaintiff, these ways include:

A. By preliminary or technical objection for example that the case is not within this order or that the claim or affidavit in support is defective such as no due verification of the claim

B. On the merits, for example that he has no good defense on the merit, or that a difficult point of law is involved or a dispute as to the facts ought to be tried.

Having looked at the grounds upon which a defendant may rely to oppose an application for summary judgment it is necessary to examine the test which the court should adopt to rule whether there is a defense. Mulla[47] says that leave to defend should be given unconditionally if the defendant shows a prima facie case or raises a triable issue. Leave should be made conditional if the court doubts the good faith of the defendant or thinks that the defense is only put in to buy time. He then goes on to give the test for determining whether the facts alleged by the defendant would, if established, be a good defense – the court could not go into the question whether the facts alleged were true or not, and that would arise only after the leave was granted; and the condition as to the security could be imposed if the court was of the opinion that the defense was frivolous and untenable and put forward to prolong the suit. At the stage of granting leave to defend the court can consider only whether the facts if true, afford a good defense, and not whether they are true or not. This would be a trial of the case.

[46] Civil procedure by Langan and Lawrence
[47] Code of civil procedure by Mulla

In order to oppose the application the defendant must therefore file replying affidavits which rebut the claim of the plaintiff and show either that he has a set-off or a counter claim or he is entitled to defend the suit. By the statement 'the defendant may show cause by affidavit' it is anticipated that the courts will generally require an affidavit from the defendant before it will feel satisfied that the defendant is entitled to a leave to defend save in exceptional or obvious cases. Thus the fact that he has served a defense may be sufficient to enable the defendant to give leave to defend but not if it is a sham defense served at or soon after appearance[48].

Supreme court practice requires that the defendants affidavit must 'condescend upon the particulars' and should as far as possible deal specifically with the plaintiffs claim and affidavit and state clearly and concisely what the defense is and what facts are relied on as to supporting it. It should also state whether the defense goes to the whole or part of the claim and in the latter case it should specify the part.

A mere denial that the defendant is indebted will not suffice, unless the grounds on which the defendant relies as showing that he is not indebted are stated. In the case of WALLINFORD V MUTUAL SOCIETY[49] it was noted that the affidavits brought forward must condescend upon the particulars and the defendant must give such an extent to definite facts to satisfy the judge that these facts which make it reasonable that he should be allowed to raise that defense.

The defendant having showed cause the court proceeds to exercise its discretion in giving leave to defend or deny it altogether. In doing this it has to look into various factors that

[48] Mclardy v Mutual society (1880) 5 C A Pg 708 at 725
[49] (1880) 5 C A

govern the application. It would now be appropriate to examine the courts exercise of discretion in a case where a defendant has shown cause to defend.

3.3 EXERCISE OF DISCRETION BY THE COURTS

Before granting leave to defend the judge must in each case, exercise discretion. The judge is not bound to give judgment for the plaintiff for every application made. If the defendant satisfies the judge that he has a good defense on merits, the judge could not make an order empowering the plaintiff to execute such an order.

Mulla states that leave to defend shall not be refused unless the court is satisfied that there is absence of substantial defense or that the defense is frivolous or vexatious[50]. He then proceeds to give three situations which may possibly arise before the court exercises the discretion and these are:

A. The defense may be of a substantial nature.
B. The defense may be frivolous or vexatious.
C. The defense may be triable and if given opportunity the defendant may be able to make good his case if there is an exercise of discretion by known and recognized principles.

The triable issues may be about want of consideration, execution, lack of legality, and lack of formality of execution. Thus the court has to exercise its discretion by examining each case in the light of its large experience and the circumstances prevailing.

[50] Code of civil procedure by Mulla

In order to exercise its discretion the court must be guided by known principles which have been developed in practice over a long period. Mulla suggests that it is only in cases where the defense is patently dishonest or so unreasonable that it would not reasonably be expected to succeed, that the exercise of discretion by the trial court to grant leave unconditionally may be questioned. He gives the following as principles to be used while considering the question of granting leave to defend:

1. If the defendant satisfies the court that he has a good defense to the plaintiffs claim, then the defendant is entitled to unconditional leave to defend.
2. If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defense (although not a positively good defense) the plaintiff is not entitled to judgment and the defendant is entitled to unconditional leave to defend the suit.
3. If the defendant discloses such facts as may be deemed sufficient to entitle him to a defense, the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend, but in such a case the court may in its discretion impose conditions as to the time or mode of the trial.
4. If the defendant has no defense or the defense set up is illusory or shown to be particularly unlikely then ordinarily the plaintiff is entitled to judgment.

The above principles were stated in the case of GUPTA V CONTINENTAL BUILDERS LTD[51] and later enunciated in the case of CITY PRINTING WORKS (K) LTD V BAILEY[52] where City printing works the defendants appealed to the East African court of appeal from the decision of Madan J which he imposed conditions on the defendant on granting it leave to

[51] (1978) K L R
[52] (1977) K L R

defend the proceedings instituted by Peter Bailey. By his pleadings in the suit he averred that the defendant agreed to employ him as a general manager on terms including an annual bonus of Ksh 12 000; that he worked in that capacity for two years and claimed Ksh 24 000 being the bonus for that period. The defendant admitted the facts pleaded but denied that the plaintiff worked as a general manager but as a designer and there was never an agreement to grant gratuity. The plaintiff then applied for summary judgment under order XXXV rule 1. The defendant company was granted leave to defend conditionally subject to depositing in the court the sum of 24 000 within 20 days. On appeal justice spry said;

"The general rule is that leave to defend should be given unconditionally unless there is a good ground for thinking that the defenses put forward are no more that a sham and it must be more than mere suspicion"

It is evident from the developed principles and judicial opinion that when exercising discretion the court will either give conditional or unconditional leave to defend the suit.

As a general rule where a defendant shows that he has a fair case for defense or reasons for setting up a defense he ought to be allowed leave to defend and the plaintiff ought not to be allowed to get summary judgment nor the defendant required to find security[53]. This is a situation in which court grants unconditional leave to defend.

Order XXXV was not intended to shut out the defendant who could show that there was a triable issue applicable to the claim as a whole from laying his defense before court, or make him liable in such a case to be put on terms of paying into court as a condition of leave to

[53] Manger v Cash (1889) 5 T L R 271 at 286

defend. Judgment should only be ordered where, assuming all the facts in favor of the defendant, they do not amount to a defense in law where there is a triable issue though it may appear that the defense is not likely to succeed.

In giving conditional leave to defend the courts have laid down some principles to be followed. For example a general principle has been laid down that if a fair case for defense is made out by the defendant, unless it is displaced by undoubted documentary evidence, as an account showing a balance due on a letter promising to pay, the defendant ought to be allowed leave to defend unconditionally[54]. The defendant ought not to be shut out from defending unless it was very clear indeed he has no case in the action under discussion. There might be either a defense to the claim which was plausible or there might be a counter claim pure and simple. To shut out such a counter claim if there was substance to it would be an autocratic and violent use of the order[55].

The order states that the defendant may show cause to defend by means of a set off. If the defense of set off is raised the defendant is entitled to unconditional leave to defend up to the amount of the set off claimed. If there is a set off at all, each claim goes against the other and either extinguishes or reduces it[56].

Conversely the court may proceed to grant conditional leave to defend. The condition of payment into court or giving security is nowadays more often employed than formerly and not only where the defendant consents but also where there is good ground in the evidence for believing that the defense set up is a sham defense and the court is prepared very nearly to

[54] Saw v Hakin (1888) 5 T L R
[55] Lord Asher in Sheppard's v Wilkinson (1889) 6 T L R
[56] Hanak v Green (1958) 2 Q B D 9 at 1288

give judgment for the plaintiff. This principle was stated in the case of KANDALAL RESTAURANT V DEVSHI AND COMPANY[57] where the plaintiff sued the defendants on a specially endorsed plaint and filed a motion for summary judgment under order XXXV rule 1 and rule 3. The defendant asked for leave to defend relying on a statement of defense and an affidavit sworn by a partner alleging that there was no privity of contract between the plaintiff and the defendant and that the alleged transaction was void for illegality under the price control regulations. The plaintiffs filed two affidavits in reply. On the motion for summary judgment, leave to defend was granted conditional on payment of 7000 Ksh into court within seven days as security. The condition was not complied with. On application from the plaintiffs judgment was entered for the plaintiffs as prayed. The defendant then appealed from the judgment. The appeal was dismissed with costs and the court re iterated the fact that conditional leave to defend will be granted where the court entertains slight doubt in the defense proposed to be set up and where it is on the verge of giving judgment to the plaintiff.

It should be noted at this point that the discretionary powers given by these rules are very wide and the terms imposed on granting conditional leave to defend may relate to the giving of security or time or mode of trial or any combination thereof. The more usual terms are to require the defendant to bring into court within a specified time a sum representing the whole or part of the claim and in default leave to defend is defeated. For example in CITY PRINTING WORKS LTD V BAILEY[58] where the applicant claimed 24 000, court granted the defendant company leave to defend subject to depositing 24 000 within 20 days failing of

[57] (1952) 19 E A C A 77
[58] (1977) K L R 85

which liberty would be given to the plaintiffs to obtain judgment as prayed against the defendant together with costs of the application.

The order provides for a time limit within which a defendant who has been granted leave before he files a defense is required to file one., it provides that he shall file his defense within fourteen days of the courts grant unless the court orders otherwise[59]. This is a mandatory requirement which must be complied with and failure to do so defeats the logic behind the defendant applying for such leave since he cannot do so if he lacks a good defense.

This chapter attempted to examine the conditions which a plaintiff must meet to obtain summary judgment and also what a defendant should establish in order to obtain leave to defend. It has revealed to us the necessary conditions a plaintiff must meet in order to sign a judgment and the standards which a defendant should also establish in order to obtain leave to defend. It has also exposed the principle that in order to grant either of the parties the prayer sought the court exercises a lot of discretion taking into account the circumstances of each case. This is done carefully so that neither of the parties who may have a case is prejudiced. Indeed this is a manifestation of good legal drafting which has been duly interpreted by the law enforcers to achieve the desired intention of parliament.

The next chapter examines how this desired aim is achieved through the set up mechanisms of the law.

[59] Order XXXV r 4

CHAPTER FOUR

THE EFFICACY OF SUMMARY PROCEDURE

4.0 INTRODUCTION

I have in the last chapters analyzed the historical and theoretical foundation of summary procedure and its availability to parties to a suit after having satisfied a number of conditions generally. This chapter addresses itself to the question whether order XXXV provides for sufficient and efficient machinery for ensuring the desired aim of summary procedure is met. Where it is felt that its provisions do not efficiently meet this aim I shall seek to make

recommendations for reforms to be incorporated into the present law in order to cure the deficiency.

As we had earlier on observed the principle underlying the necessity of order XXXV is that where a defendant has no arguable defense at all, or no defense other than one as to amount of damages, the plaintiff should be entitled to save time and costs by having summary judgment awarded to him[60]. For this reason provisions of order XXXV have to ensure that this desired effect is achieved. Therefore there are provisions within the order which safeguard this principle. The issue then is whether these provisions are effective in their application and if not what should be done to ensure that the ends of justice are met. Summary procedure should not be employed as a draconian procedure to deny a defendant his right to defend the suit against him. On the other hand defendants should not waste time engaging in vexatious and frivolous litigation. Litigants should have reasonable expedition in the conduct of their cases.

4.1 ANALYSIS OF EFFICACY:

What then are these provisions which ensure that the order is applied efficiently for the benefit of both parties to the suit?

Firstly the order sets out the manner of application which must be complied with while instituting summary procedure. The manner of application 'shall be by a motion supported by an affidavit either of the plaintiff or some other person who can swear positively to the facts verifying the cause of action and any amount claimed[61]. This rule strictly rules out any other manner of application since it has to be construed that where a specific procedure has been

[60] Civil procedure by Langan and Lawrence
[61] Order XXXV r 1 (2)

stipulated and the applicant should observe the requirement and follow it. This necessitates that the plaintiff must file the required documents in court rather than for instance wait to make for an oral application when hearing commences.

It should be noted that this provision makes it mandatory for the plaintiff to swear an affidavit verifying a cause of action and the amount claimed. Thus the affidavit should specifically state the cause of action and the exact amount claimed. Swearing an affidavit is considered to a serious mode of giving evidence and one cannot swear an affidavit when he believes he cannot prove what he has deponed to. Giving false evidence may result into criminal prosecution for the offence of perjury and for this reason risks being committed for a jail term if he lies through swearing an affidavit.

It would also appear that only one affidavit is envisaged in this kind of application by the plaintiff. This safeguards against filling supplementary affidavit s as this could easily be abused by the plaintiff by giving more grounds for his application after discovering the defense the defendant intends to rely on. An excerpt of an interview with justice Bosire[62] reveals that 'an affidavit' strictly means only one affidavit from the plaintiff is required. However as noted in an earlier chapter judicial interpretation is to the effect that supplementary affidavits could only be filed after seeking leave from court to do so. This guard's against misuse of information filed by the defendant by allowing the plaintiff to file further information as the court will have to examine all the surrounding circumstances before granting such leave. This rule of exception where supplementary affidavits can be allowed to be filed after a plaintiff has sought and convinced the court to grant such leave

[62] Court of appeal judge Kenya

was enunciated in the case of ABDUL AZIZ SULEIMAN V SOUTH BRITISH INSURANCE CO. LTD[63].

The foregoing rules of practice help protect the defendant's interests in several ways as elucidated above. Furthermore the filing of a notice of motion ensures that the defendant is served with a copy thereof to enable him if possible file grounds of objection by applying to defend the suit if he can show cause to do so.

Likewise allowing another person to swear the affidavit through a third party where he is not able to do so personally is a testament to the efficiency of the order. It can legitimately be asserted at this point that this provision was designed to achieve the aims of summary procedure. This is because it adequately protects both the interests of the plaintiff and the defendant who may be parties to summary proceedings.

In order to ensure effective litigation there are rules of practice as to the service of copies of documents filed in court onto the other party to a suit. These rules normally prescribes the manner of service and the time within which such service shall be effected. Order XXXV require that sufficient notice of motion which notice shall be in no case later than seven days[64] be given to the defendant. Time is of essence because it ensures that the party served is protected from undue harassment by the adverse party. The seven days notice in this case is intended to stop the plaintiff who could take advantage of summary procedure to rush through the court process and obtain judgment to the detriment of the defendant. Therefore before seven days elapse such an application cannot be heard and determined and it is

[63] (1965) E A 66
[64] Order XXXV r 3 (1)

incumbent upon the plaintiff to prove to the court that the notice period has elapsed since service thereof before he may proceed with the hearing of the suit.

Likewise order XXXV requires a defendant who has not already filed a defense and is granted leave to defend to file his defense within fourteen days of the grant of leave unless the court otherwise orders[65]. This provision seeks to protect the plaintiff in that it ensure expeditious disposal of the suit. He must therefore comply with this provision and file his defense within fourteen days to avoid judgment being entered against him for default of defense. But it should be observed that the court has got the discretion to order otherwise. This means that considering other factors the court may allow the defendant to file a defense out of time upon making such an application. This enables the defendant to file a defense out of time where he has reasonable ground to explain his delay.

In practice the courts exercise a substantial discretion in either giving or denying leave to defend. The court may make it conditional or unconditional. The courts look at the circumstances of each case and decides to give a certain order. For example the court may grant conditional leave to defend by an order for the defendant to deposit security with the courts. This was judicially recognized in the stated case of CITY PRINTING WORKS (K) LTD V BAILEY[66]. Therefore such rules of practice tend to protect the plaintiff against vexatious and frivolous defense by the defendant.

Another device that has been included into the rules to ensure they work efficiently is with regards to costs of the suit. In civil litigation costs have been incurred by the parties and rules

[65] Order XXXV r 4
[66] (1977) K L R

have to be devised to deal with who has to pay the costs. Order XXXV states that applications under the order shall be dealt with by the court on the hearing of the application and the court shall order by and to whom and when the costs shall be paid, or may reserve them to be dealt with in the trial; provided in case no trial takes place afterwards or no order as to costs is made the costs are to be costs in the cause[67]. It further provides that if a plaintiff makes an application under this order and where the case is not within the scope of this order or where the plaintiff in the opinion of the court knew that the defendant relied on the contention which would entitle him to unconditional leave to defend, the application may be dismissed with costs to be paid forthwith by the plaintiff[68]. In the first instance above the order gives the courts the discretion to award costs to the desired party but in the second instance it holds the plaintiff strictly liable to pay the costs where he knew the defendant relied on a contention entitling him to unconditional leave to defend.

Jacob suggests that these rules confer express powers onto the court:

1. to dismiss any application under the order either by
    a. Where the case is not within the scope of the order.
    b. Where the plaintiff knew, before the issue of summons that the defendant was relying on an arguable defense and
2. To order the plaintiff to pay the costs of the application and to do so forthwith except where he is an assisted person.

A case is not within the scope of order XXXV:

A. Where no statement of claim has been served on the defendant.

B. Where the claim includes one outside the scope of this order as coming within the rules.

[67] Order XXXV r 8 (1)
[68] Order XXXV r 8 (2)

C. Where the affidavit in support of the application is defective for example in omitting to state the deponents belief that there is no defense to the claim or part thereof.

D. Where the application is made against the government[69].

If before the issue of the summons the plaintiff knows the defendant is relying upon a contention which would entitle him to an unconditional leave to defend he cannot invoke order XXXV to get summary judgment for he cannot make an affidavit in support stating that in his belief there is no defense to the claim to which the application relates. Therefore if the plaintiff is possessed with knowledge of an existing defense but proceed nonetheless then such an application will be dismissed with costs.

Sometimes a plaintiff resorts to order XXXV not with any expectation of success but to induce the defendant to disclose on oath the nature of his defense. This is not legitimate and it amounts to abuse of process of the courts and in such cases the application should be dismissed and the plaintiff made to bear the costs.

It should be noted that when an applications by plaintiffs are dismissed the plaintiff must meet the costs of the suit because it is his fault in making a frivolous or vexatious application or an application without good faith.

In the event of costs on giving conditional leave to defend the order for costs generally corresponds with the condition imposed and the operation is made dependant upon whether or not the condition is fulfilled. This means that if the leave is conditional upon the whole demand being paid into court the usual order is that the condition is complied with the costs

[69] Order XXXV r 3 (2)

are the same as the upon unconditional leave to defend being given. And if leave is conditional upon part of the demand being paid into court the usual order for costs is the same as upon judgment of part of the claim.

Conversely costs on unconditional leave to defend where the trial is ordered the usual order is for the costs to be in the cause and where it is transferred for trial the usual order is for the costs to be in the discretion of the court. From above it can be discerned that the courts are given the discretion to order the costs while dealing with matters of order XXXV. Every applicant goes to court risking paying the costs if the court deems it necessary. This rule out the possibility of less serious litigants invoking any of the provisions of because they will be made to bear the costs. The courts are the custodians of justice and giving judges discretion on determining who pays the costs attests to the efficacy of the order (giving it a human touch so that each case can be weighed on its merit).

Lastly order XXXV safeguards the interests of parties to the suit through its mechanism to set aside judgment made there under. Any judgment given against any party who did not attend the hearing may on application be set aside on such terms that are just[70]. Since summary procedure is so fatal it defeats logic for either party to be absent at the hearing of an application made under the order especially if such an absence is not due to his own fault. Where such circumstance exists as to justify a party's absence then such a party should be allowed to make an application to set aside or vary the decision hence the need for the order to provide this. Power of the courts to set aside or order under this rule are of the widest amplitude and can be exercised not only when there is no service of summons but also when

[70] Order XXXV r 10

there is sufficient cause of non appearance. When an application under this rule is ordered on condition that the defendant do deposit a certain sum of money in court and on his failure to do so there is again an ex parte decree, the decree is one of merit and it acts as res judicata.

The underlying principle is that the court has the power to revoke the expression of its coercive power where a decision has been obtained by a failure to follow any of the rules of procedure. And this power has been expressly provided for by this order.

The aim of summary procedure was eloquently elucidated in the following case. As stated above the courts have had opportunity to specify the meaning and aims of summary procedure. In the case of JACOBS V BOOTHS DISTILLEYR COMPANY[71], Lord Halsbury had this to say about summary procedure:

"*The effect of order 14 is that upon the allegation of one side or another, a man is not permitted to defend himself in court; that his rights are not to be litigated at all. There are things too plain for argument; and where there were pleas put in simply for the purpose of delay; which only added the expense and where it was not in aid of justice that such thing should continue, order 14 was intended to put an end to that state of things , and to prevent sham defenses by defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who are endeavoring to enforce their rights*".

[71] (1901) 85 L T

This illustration clearly shows what summary procedure is all about. The principle which underlies o.XXXV is that where a defendant has no arguable defense at all or no defense other than damages, the plaintiff should be entitled to save time and money by having summary judgment awarded against him[72]. This will ensure that suits are determined expeditiously and that justice is not delayed.

So the question that I ask myself is, have those aims of efficacy and speed in relation to summary procedure been achieved. The following is a brief discussion on the issue.

What should be taken into account is the circumstances of each case but in my speedy trial as on the aims of summary procedure has not been achieved. A review of the practice shows that summary procedure is not speedy or summary at all in certain circumstances. Parties have found a way of abusing and prolonging the process altogether. This is illustrated in the Ugandan case of MITCHELL COTTS LTD V PETER MULITA, this suit was brought under summary procedure claiming a recovery of a sum of Ushs 1 202 629 155 in 1999. The case went on and was not resolved until 2004.after five years. This is too long a period for summary proceedings. All in all the order provides in its safeguards the efficient mechanisms in of a speedy and efficient system

[72] Langan p 61

CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSION.

5.0 RECOMMENDATIONS:

At this juncture I shall venture into some of the reforms that I feel necessary to make summary procedure more efficient. The question as to whether seven days notice given to a defendant is sufficient notice for a defendant to file his defense. This appears to be too short a notice considering a situation where the defendant lives too far from the courts jurisdiction. I wish to propose that this period should be determined by the courts depending on the circumstances of each case. Judicial officers are reasonable individuals who can weigh the factors of each case and reach a decision which is favorable to both parties to a suit. Not

every person is equal because people come from different geographical and economic backgrounds. What would be required is for the plaintiff to prove service thereof and move the court to determine the issue whether the notice is sufficient in each case. This recommendation is in line with ends of justice.

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These are the recommendations proposed in order to make summary procedure more efficient.

5.1 CONCLUSION:

Throughout this work I have been trying to address the issue as to whether summary procedure offers a way of speedy and effective civil litigation. In order to answer this question we had to traverse through a number of issues which revealed interesting conclusions.

I had the opportunity to allege and prove that the aim of summary procedure was to achieve quick redress to a plaintiffs claim in liquidated demands or recovery of land where he has so believed that there was no defense to the claim.

I have also shown that summary procedure can only be invoked for the limited and specified instances under the order. These are claims for a liquidated demand with or without interest for the recovery of land, rent and mesne profits.

In order to give summary judgment or leave to defend the suit the court has developed a practice through which it exercises discretion as per the circumstances of each case. We also saw that conditional leave to defend is granted to a defendant where the judge entertains a slight doubt as to the seriousness of the defendant's application to defend.

In drafting this order it was intended that it safeguards the interest of both the defendant and the plaintiff. It was not meant to be used as an oppressive tool by the plaintiff or as an instrument to delay justice by the defendant who does not deserve an opportunity to defend the suit. As a result of this, several safeguards were included in the order to ensure this ends. This work has analyzed all the safeguards in the order.

At this juncture the issue to be addressed is whether order XXXV has achieved its desired aim which is to ensure speedy and effective litigation in areas covered by it. It is not disputable that our examination of order XXXV by this thesis has revealed that it has served its purpose effectively. Apart from the recommendations I made for reform, there wasn't any other area I could deduce a lacunae to be filled.

Justice Bosire likewise concurs with my views. He contends that this order has worked efficiently because there have only been few amendments made to it since its inception. So far only three amendments have been effected on it. The first amendment was effected though legal notice number 119 of 1975. The latest amendment was through legal notice number 50 of 1984 and it deleted debts as being one of the claims which could be recovered summarily. Accordingly this limited amendment of the order acts as a pointer to an assertion that order XXXV has provided a mechanism for speedy and effective recovery of specified claims summarily.

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