



**COPY**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NUMBER 241 OF 2011**

**MUNICIPAL COUNCIL OF MOMBASA ..... PLAINTIFF/APPLICANT**

**-VERSUS-**

**NATIONAL COUNCIL CORPORATION ..... DEFENDANT/RESPONDENT**

**RULING**

[1] When this matter came up for hearing on 13th November, 2013 Mr. Kadima Learned Counsel for the plaintiff raised an issue that this is a purely commercial matter. That it seeks performance of a contract entered to by the parties as in evidenced by the minutes of the council on 6th March, 2009 on page 1 - 9 of the list of documents. He averred that this is not a pure sale of land. Mr. Wafula learned counsel for the defendant argued that this matter deals with cultivation, ownership and occupation of land as evidenced by the counterclaim dated 8th September, 2011. He argued that this court is the proper forum where the case should be heard.

The applicants urged the court to decide whether this is a land matter or a commercial matter.

[2] The genesis of this matter was that the plaintiff avers that it owed the defendant a development loan of Kenya Shillings 260 Million (Kshs. 260,000,000.00) for development of various estates in Mombasa. The plaintiff and the defendant agreed to swap that land with a property comprised in MSA/XII/424 Jomo Kenyatta Makande and the parties agreed that the property be valued and its value be applied to swap the debt as agreed. The plaintiff valued the estate through Tysons Ltd and the value was ascertained to Kshs. 301,000.000.00 Million. It is averred by the defendant that the valuation was accepted by the defendants and it formed the basis of negotiation in settlement of the debt. The plaintiff alleges it paid a further Kshs. 50,000,000.00 as excess to seal the deal. The Plaintiff was then handed over the documents of title MSA/XIII/114 to the defendant for surrender to the land office and for issuance with a new lease. Further that the plaintiff indebtedness to the defendant and all other estates which were financed by the defendant and forming part of the land that is today Buxton Estate, Tom Mboya Estate, Likoni - LH, F AND L Mvita Estate and Changamwe New and Old Estate were absolutely released from any encumbrances or claims by the defendant.

[3] The defendant filed a defence and counterclaim. It admitted that it was owed Kshs. 260 million by the plaintiff but denied that it agreed to swap the said land with property comprised in Mombasa/Block XII/434. It contended that the parties agreed to swap the loan with Mombasa/Block XIII/114 measuring 9.36 acres in settlement of the said debt. That the said plot was valued Kshs. 310 million and a as such it was supposed to pay up Ksh. 50 million to the plaintiff. The defendant acknowledges a meeting held on 15th May, 2009 and that under minute 4.1.4 the plaintiff was supposed to transfer the property known as Mombasa/Block X111/114 to the defendant for the defendant to acquire an encumbered title. The defendant in the end in its counter claim prays that the settlement agreement between the plaintiff and the defendant be rescinded and the debt against the plaintiff in the amount of Kshs. 260 million plus compound interest be reinstated.

[4] This was an exchange of a commercial debt owed by the plaintiff to the defendant with land. Both parties as can be seen rely on that agreement for settling the debt to support their claim in the plaint (in

case of the plaintiff) and in the counterclaim (in case of the defendant). The interpretation of that agreement is key in this case in my view. It is not in dispute that debt was owed to the defendant and the lands were owned by the plaintiffs. It is therefore not a case of ownership, occupation or right to land at all. It is a case of interpretation of the meaning of a contractual agreement between the plaintiffs and the defendant in settling a commercial debt of Kshs. 260 million.

[4] This can hardly be said to be a land matter. It is true that land is used to secure the debt and in exchange of the debt but it is not the core dispute of the parties. The dispute as earlier stated is the interpretation of the alleged commercial agreement. I therefore rule that this matter shall be moved from the Land and Environment Division to the Commercial Division of this Court for final hearing and final determination.

**Dated and delivered in open Court at Mombasa this 27th day of March, 2014.**

**S. MUKUNYA**

**JUDGE**

**27.3.2014**

In the presence of:

Miss. Ake Advocate for the plaintiff

Mr. Wafula Advocate for the defendant