



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Commercial Civil Case 14 of 2011**

**SHAHBAZ KHAN.....PLAINTIFF**

**VERSUS**

**BYRAN THAIRU NDUTA.....DEFENDANT**

**Coram:**

Mwera J.

Gitau for Plaintiff

Kinyanjui for Defendant

Furaha Court Clerk

**R U L I N G**

The plaintiff filed a notice of motion dated 18<sup>th</sup> July, 2012 under Order 51 rule 1, Order 13 rules 1, 2, Order 2 rule 15 (b) (c) of Civil Procedure Rules with two prayers:

- (i) that judgment on admission in the defence be entered against the defendant for Shs. 12,674,500/=; and
- (ii) that the defence herein be struck out for being scandalous, frivolous, vexatious and an abuse of the court process.

The above was premised on the grounds that in paragraphs 3, 4, 5, 8, 11, 13 of the defence, it was admitted that there was a memorandum of understanding (MOU) of 3<sup>rd</sup> July, 2010 between the two that the respondent owed the stated sum. He has failed to honour that understanding by not abiding by the terms of the debt swap sale agreement dated 20<sup>th</sup> April, 2011. That the respondent has on numerous occasions frustrated the plaintiff's attempts to recover the debt, and has filed the defence herein which is a sham, an embarrassment and meant to delay the recovery of the debt, which has not been denied.

The plaintiff's stated in the supporting affidavit that the parties had a memorandum of understanding to the effect that there would be a swap of plot L.R. No. 209/22 for a debt of the said Shs. 12.6 million. There was a 2<sup>nd</sup> sale agreement for the debt swap with plot No.

LTK/KAMANA/TIKONDO/4358 dated 20<sup>th</sup> April, 2011 (see annexure sic 3A, B, C). Thus filing a defence in this case was meant to embarrass. It should be struck out and judgment in the debt sum Shs. 12.6 million, entered in favour of the plaintiff. Dishonoured cheques were exhibited (annexure 4A, B, C dated 4<sup>th</sup>, 21<sup>st</sup> October, 2010). Orders as prayed should thus issue with costs and interest.

The defendant filed a replying affidavit denying owing the debt Shs. 12.6 million. That the two had no swap sale agreement, and that the same was frustrated by the plaintiff and thus lost validity. That the

plaintiff did not pay consideration in respect of the sale agreement which the defendant was entitled to avoid. That the parties should rather go for arbitration as provided for in the agreement of 20<sup>th</sup> April, 2011 (clause 11). The defendant deponed that he had pleaded coercion and duress in his defence, in which it was also pleaded that the plaintiff repossessed and sold some motor vehicles and did not render any account of the proceeds thereof. That the plaintiff was seeking a short-cut for unjust self-enrichment. Both sides submitted.

After perusing the submissions, basically echoing what was averred in the affidavits plus annexures, the court attention went to the plaint where the issue of swapping land a sub-division of LR No. 209/22, Runda for the debt of Shs. 12.6 million featured and, reference was made to proceeds of sale of some motor vehicles. Then the presence of the M.O.U. and then land No. LTK/KIMANA/TIKONDO/4358. The defendant also referred to the same Runda land which he was to acquire and that the purchase was not completed. Such was the condition. Then that some motor vehicles were repossessed and sold without accounting for the proceeds – an act which overtook the deal of transfer of the land. No reference was made to the Tikondo land but that cheques were issued under duress which cheques “*bounced*” on presentation.

Having all the foregoing in mind, this court is unable to conclude that a case of admission of the debt has clearly been made out to warrant the orders sought. What appears quite probable is that the parties ought to set down this case for a trial so that evidence is systematically laid before the court which will then finally decide the dispute on its merits. A decision at this interlocutory stage appears untenable.

Consequently, prayers are not granted. The parties to file witness statements, bundles of paginated documents plus issues for determination in the next thirty (30) days, whereupon directions as to hearing dates will follow.

Costs to be in the cause.

Delivered on 24<sup>th</sup> October, 2012.

**J. W. MWERA**

**JUDGE**