



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL SUIT NO.154 OF 2003**

DAVID BETT LANG'AT ..... PLAINTIFF

VERSUS

EZEKIEL KIPLELELI BARNGETUNY ..... DEFENDANT

**Coram: Before Hon. Justice Mwera**

**Munyithya for the Plaintiff**

**Miss Muthae for the Defendant**

**Court clerk – Sango**

**R U L I N G**

The plaintiff's notice of motion dated 23.3.04 is brought under O.35 r. 1 (1) (a) Civil Procedure Rules and S. 3A Civil Procedure Act. By it, it is prayed that summary judgment be entered against the defendant as per the plaint herein together with interest . That the defendant had no tenable defence and thus the orders ought to be granted.

Mr. J. Munyithya who argued this application made reference to the principal pleadings (the plaint and defence plus counter claim) and the affidavits by both sides together with annextures.

The basis of the claim was that on 18/2/97 the defendant in his own capacity and as a director of a company called Chebek Ltd. entered a sale agreement to sell/buy some properties in Malindi known as PORTION NOS. 9359, 9360, 9351 and 9362. The other parcel of land, part of the deal was PLOT NO. 3966 SECTION 1 MN – all for Sh.17 m. That while the defendant did all this he did not have authority to sell the properties owned by Chebek Ltd. because the other director did not approve. That particularly as regards PLOT NO. 3966 (not 3366 as per the plaint), the property had already been charged to a financial institution. During arguments the court was told that the institution was the National Bank of Kenya yet the defendant did sign the agreement aforesaid with one SPECIAL CONDITION reading:

“6. The vendors undertake to forthwith apply for a provisional certificate from Land Registry Mombasa for the missing title of Plot No. 366 Section 1 MN.”

The court was told that this amounted to something like a fraudulent misrepresentation because while the defendant knew that the original title was with a bank, he represented that it was missing and thus a provisional one had to be sought. From what transpired, it may as well go without saying that such a provisional title was never sought and in any case the deal seems to have fallen through – hence this cause.

Back to the plaint dated 3.7.03, it was averred that when the deal fell through the parties entered a memorandum of understanding (MOU) on 12.3.03 before their advocates confirming that the defendant had received Sh.9 m. in the said deal; that they rescind their sale agreement aforesaid; that the defendant do pay Sh. 9 m. plus Sh. 4 m. interest all totaling Sh.13 m. That the defendant had to pay Sh.2 m. by 30.4.03 and the balance over a year. And that on signing the MOU, the plaintiff had to return all the documents in the transaction to the defendant. That the plaintiff did just that while the defendant refused, neglected or failed to make the payments. That accordingly he was bound by the said MOU and he had to honour his part.

In the defence dated 19.8.03, it was averred that the plaintiff was chasing the defendant who was only acting as a director of the corporation – Chebek Ltd, which was improper. He denied the rest of all the claims including receiving the money (Sh. 9 m) or even being a party to the sale agreement. Further down the pleading, it was said that a sale agreement of 13 parcels of land (Nos. 8930 to 8942) for Sh.17 m. was entered into. That the plaintiff paid to the defendant Sh.9 m. but did not abide by the 90 days set to complete the balance of Sh.8 m. That the defendant did convey the documents of these properties to the plaintiff and only awaited payment of Sh.8m. And that it took over 5 years without having that money paid. However that for the 2 litigants being close friends the defendant did enlarge the time within which the plaintiff had to pay up. The defendant claimed that he was semi-illiterate and that the plaintiff thus manipulated him in March 2003 to sign the M.O.U. That the defendant was made to believe that the M.O.U was only for record and that he had no obligation under it at all. That to him the sale agreement still existed and that the plaintiff had played fraud and false fraudulent misrepresentation on the defendant. Particulars were set out.

In the counter-claim, it was pleaded without particularity that the plaintiff breached the sale agreement. And that the M.O.U purporting to rescind that agreement be avoided. The defendant sought the Court's declaration in that regard. He seemed to have forgotten to claim for specific performance of the said sale agreement. There was a reply to that defence but we need not go into that here.

Mr. Munyithya argued in the manner set out above and along the lines of the plaintiff's supporting affidavit and remained of the view that the M.O.U. was valid and binding and judgment should be entered as prayed.

Miss Muthae for the defendant took a contrary view. She put forth the argument that the plaintiff could not sue the defendant without or because he was acting as a director of Chebek Ltd. That he was illiterate and could not thus be bound by the M.O.U. And that the issues raised in the defence and counter-claim can only be properly and finally settled by way of trial – and not at this point. That this was not a clear case suitable for summary judgement. Some case law was cited. The court will refer to it if need be. And that if orders sought are granted execution be stayed until the counter-claim is heard.

In this court's view the vendors of the properties herein were the defendant and a company called Chebek Ltd. They were so described in the sale agreement. The court is also satisfied that of all the properties being sold only the defendant's land was the subject of this suit. He said in the statutory declaration appended to the sale agreement of 18/7/97:

“1. That I am the registered owner of all that property known as LR MN/1/39/66 with the developments thereon.

2. That I cannot trace the Certificate of Lease of the said property even after diligent search.”

It is not said or considered that the sale agreement and this declaration refer to different parcels of land. So it is one and the same and the subject here. It is also not said that No.3369 is not 3399 as per the documents here. So all in all this court moved along the path that parties were in agreement that the subject property; whether they called it No.3366 or 3369 ,is one and the same. In any case on 7.5.97 one P.K. Lang, another director of Chebek did ask and it is not doubted that the land registrar (MBA)

recorded a restriction against the other properties in the sale agreement – portions of plot Nos. 8933 to 8946 and 8953 to 8960 and 9359 to 9362, (to leave out the irrelevant ones). That leaves us only the defendant's parcel of land above.

Further this court holds that the M.O.U. of 12.3.03 is valid and binding. It expressed what the parties wanted regarding the sale agreement of 18/2/97 which is as per the plaint. This court was not of the opinion that the defendant was duped into it. Even if it is evidence needed to show so, it was not lost on the court that the defendant was once upon a time a Member of Parliament, a fact Miss Muthae did not deny. Probably he was taken there with the semi-illiteracy he confesses now but in any case his lawyer (and it is said his son) attended the signing of the M.O.U. That lawyer Mr. S.K. Kirui has not deposed that his client was manipulated, coerced or in any way made to sign that M.O.U. and he did so out of ignorance and illiteracy regarding the contents and effects thereof. That was the defendant's act. He admitted there as in the defence receiving the money. The M.O.U rescinded the contract of 18/2/97. He bound himself to pay the agreed sum of Sh.13 m (the original Sh.9m received plus Sh.4 m. as interest). This constituted a contract with a liquidated sum. The defendant did not honour his bit. That sum is claimed. It is shown by this application that it falls to be paid. Judgment is entered as prayed. The counter-claim which in essence is a separate suit may be tried later. After all it prays for no money from the plaintiff. Only declarations. Thus the decree following this ruling need not await the hearing and determination of the said counter-claim.

In sum the prayers sought are granted with costs.

**Orders delivered on 7th July 2004.**

**J.W. MWERA**

**JUDGE**