



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL CASE NO. 268 OF 2002**

**GEORFREY MWANGI KAHARO ..... PLAINTIFF**

**VERSUS**

**SAMUEL KAMANGA MUHORO ..... 1ST DEFENDANT**

**JAMNADAS HIRE PURCHASE LIMITED ..... 2ND DEFENDANT**

**RULING**

In a plaint filed on 2nd July 2002, the Applicant herein sued the first and 2nd Defendants seeking a judgment for liquidated sum of KSh.700,000, interest thereon at Commercial rates from 20th March 23002 till payment in full, costs of the suit and interest on the same at court rates from the date of filing this suit till payment in full. The suit was filed against the Defendants on grounds that the First Defendant entered into a contract for sale of a motor vehicle registration Number KAH 627C with the Plaintiff. First Defendant paid KSh.600,000/- for the same vehicle leaving the sum of KSh.700,000/- which was later allegedly to be financed by the 2nd Defendant which is alleged to have signed a purchase agreement with the First Defendant to that effect and gave an undertaking to the Plaintiff in writing to the effect that if the Plaintiff released the subject motor vehicle to the First Defendant the 2nd Defendant would take over the payment of the balance of the purchase price sum of KSh.700,000/- within 23 days. The Plaintiff allegedly honoured his part of the conditions by giving possession to the First Defendant and transferring the subject motor vehicle into the names of both First and 2nd Defendants but the 2nd Defendant has failed to honour its part of the agreement and hence the claim.

The First Defendant/Respondent did not enter appearance nor did he file Defence within the time prescribed by the law and judgment was entered against him on 25.11.2002. Second Defendant however field Defence in which it admitted that there was hire purchase agreement between it and First Defendant but stated that the Applicant/Plaintiff refused and/or neglected to comply with the express conditions as outlined in a letter dated 20th March 2002 whereupon the 2nd Defendant opted out of the agreement and thus it denies any liability to pay the sum of KSh.700,000/- claimed by the plaintiff.

At the close of the pleadings, the Plaintiff/Applicant filed this Notice of Motion seeking summary judgment for KSh.700,000/- against the second Defendant on grounds that the Plaintiff's case is too plain for argument; that the Defence filed is merely a sham and strategically designed to delay fair trial of the suit and lastly that contrary to the denial in the defence, the Plaintiff complied with all the conditions. There is an Affidavit in support of the same application together with two annexures to the same Affidavit.

The Respondent opposed the application and filed Replying Affidavit sworn by Rajan Jamnadas a Director of the said Defendant. In the Affidavit, the second Defendant states briefly that on or around

20th March 2000, the 2nd Defendant agreed at the request of the first Defendant to give financial accommodation to the First Defendant to enable first Defendant purchase a motor vehicle which was at the relevant time being sold by the Plaintiff; that the 2nd Defendant made a formal expression of the intention in a letter dated 20th March 2002 in which the Plaintiff was authorised by the 2nd Defendant to release the same vehicle to the First Defendant upon fulfillment of certain mandatory conditions; that the Plaintiff failed to honour the obligations within the time stipulated despite the fact that time was of essence; that Plaintiff despite having breached the conditions set out intimidated 2nd Defendant's employers by use of C.I.D. officers and so vide a letter dated 31st May 2002, the 2nd Defendant opted out of the same contract, that the log book for the same vehicle had never been shown to the 2nd Defendant's director swearing the Affidavit and that the Plaintiff has not revealed all facts of this matter to the court and is thus not worthy of the orders sought. That Affidavit has several annexures to it as well.

This Notice of Motion is brought under Order 35 Rules 1 (1) (a), (2) and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. Order 35 Rule 2(1) says as follows concerning application under Order 35 Rules 1:

*“2(1) The defendant may show either by Affidavit or by oral evidence, or otherwise that he should have leave to defend the suit.”*

In this case as I have indicated above the 2nd respondent complied with Rule 2(1) above by filing a defence and an Affidavit. His counsel has also addressed me.

The law on the principles upon which a Defendant will be allowed to defend is now well settled and there are several authorities on the same. If one is needed, then the case of Dhanjal |Investments Limited vs. Shabana Investments Limited CA No.23 of 1997 will suffice. It was stated in that case by the Court of Appeal as follows:

*“The law on summary judgment procedure has been settled for many years now. It was held, as early as 1952 in the case of Kundanlal Restaurant vs. Devshi & Co. (1952) 19 EACA 77 and followed by the Court of Appeal for Eastern African in the case of Souza Figuerido & Co. Ltd. Vs. Moorings Hotel Limited (159) E.A. 425 that if the defendant shows a bonafide triable issue he must be allowed to defend without conditions.”*

And the Court of appeal quoted a part of the case of Souza Fignarido at page 426 in support of that proposition.

I have on my own perused letter dated 20th March 2002 which the Applicant calls the agreement marked as Exh.A1. I have perused the undated document marked as Exh.A2, the secondhand motor vehicle purchase tax receipt dated 28.5.2002, marked Exh.B and a copy of the log book also marked Exh.B. I have also perused and considered the legal effect of letter dated 21st May 2002 addressed to First Defendant by 2nd Defendant) in the relationship between 2nd Defendant and the Plaintiff. I do feel that the Defence and the Replying Affidavits do disclose bonafide triable issues. I need not discuss the same in this ruling for fear of prejudicing the hearing of the entire case but I do feel the issues as to whether the conditions upon which the 2nd Defendant was to release their cheque to the Plaintiff were to be performed within a certain time or not and whether if the time was of essence then they were performed within that time or not and the effect of the same are matters that cannot be resolved by Affidavit evidence and must go for full hearing. I do feel the Plaintiff may not have told the truth to the court when he alleged at paragraph 2 of his Affidavit that he entered into a hire purchase agreement with 2nd Defendant. That is not correct or if it is true then that agreement has not been exhibited. Letter marked A1 which is as he says letter talking about agreement between Plaintiff and first Defendant and the role the 2nd Defendant was to play in the same deal cannot be said by any stretch of imagination to be a hire purchase agreement between Plaintiff and 2nd Defendant as Plaintiff alleges. Be that as it may, there is letter dated 31.5.2002 which raises issues as to whether the 2nd Defendant could or could not rescind whatever agreement there was between the three and the effect of the same. Those are matters for full hearing and cannot be said to be a sham.

The totality of all the above is that this application lacks merit. It is dismissed with costs to the Respondent. Orders accordingly.

**Dated and delivered at Mombasa this 25th Day of February 2003.**

**J.W. ONYANGO OTIENO**

**JUDGE**