

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL CASE NO. 75 OF 2002

THOMAS NYARIKIPLAINTIFF
VERSUS
MAJOR JOHN KIPCHUMBA
T/A HILLTOP MOTORSDEFENDANT

RULING

This is an application under Order XXXV Rule 1 of the Civil Procedure Rules. In it, the Plaintiff seeks that Summary Judgment be entered in his favour as prayed in the Plaintiff.

In his Plaintiff dated March 26, 2002, the Plaintiff sought Judgment for Kshs. 681,250/= among others. The Defendant entered appearance and filed defence in which he denied the whole of the Plaintiff's claim. In his Affidavit in support of the application under consideration, the Plaintiff annexed a receipt for payment made to the Defendant for a motor vehicle which the Defendant was to supply to the Plaintiff.

The Defendant did not file a Replying Affidavit to controvert the Plaintiff's version of events. In his defence, the Defendant makes a general denial. The Defendant does not say why the Plaintiff paid him money and whether he fulfilled the purpose of that payment. In applications of this nature, it is the Responsibility of the Defendant to show that he should have leave to defend the action (see Order XXXV Rule 2(1) of the Rules). He has not done so. His defence and Grounds of Opposition do not counter the evidence placed before me by the Plaintiff's affidavit.

In one of the annexures to that affidavit, the Defendant wrote to the Plaintiff's Advocates in response to those Advocates demand letter in which he did not dispute the debt claimed and sought indulgence to enable him deliver the motor vehicle, the subject of the parties' transaction, to the Plaintiff. His defence is, therefore, a sham and not bona fide as it is not consistent with the material availed to this Court. I have perused the case of Commercial Bank of Africa Ltd. v. P. C. J. Haria T/a Krishna Cosmetics MILIMANI HCCC 334 OF 2001 and I agree with what was said there by my learned Brother the Honourable Mr. Justice Onyango Otieno.

I, therefore, allow the Plaintiff's application dated April 30, 1999 and enter Judgment in his favour for Kshs. 681,250/= together with interest and costs. He shall also have the costs of this application.

Dated and Delivered at Nakuru this 29th day of July, 2003.

ALNASHIR VISRAM

JUDGE