



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 445 OF 2000**

DIAMOND TRUST BANK (K) LTD. .... PLAINTIFF

- VERSUS -

JOSUF KHAN JAMAL KHAN HAMAD KHAN

YUSUF HAJI MWALIMU ..... DEFENDANTS

**R U L I N G**

The Plaintiff has applied for judgement to be entered against the 1st Defendant on admission under the Provisions of order 12 rule 6 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. In support of the application is an Affidavit by the Plaintiff's Manager SHAFIQ SADRUDIN PIRBHAI.

On the 24.10.01 Counsel for the plaintiff applied for and obtained orders compelling the 1st Defendant to attend court at the hearing of the application for purposes of being examined on his Affidavit. During the said examination the 1st Defendant did admit his correct address was P.O. Box 2, SHIMONI and letters were hand delivered to his house. He however said he could neither write nor read but conceded having signed the Hire Purchase agreement with the plaintiff company for the purchase of his motor vehicle which they, the plaintiff repossessed and sold.

The Plaintiff's case in support of the application is that the 1st Defendant did on receipt of the demand letter dated 12th June, 2000 by its lawyers respond in writing on 22nd June, 2000 acknowledging the amount of Kshs.1,709,429/= was owing and pledged to pay the same after the sale of his father's 2 plots. On receipt of the said letter, the Bank's lawyers passed the same to their client and in turn they replied vide letter dated 29.6.2000 confirming that they had indeed held a discussion with the 1st Defendant and results were as per 1st Defendant's letter of 22.6.2000. The 1st Defendant however denies having written such a letter. However from the sequence and contents of the letters, it is heard to belief that the 1st Defendant had indeed neither visited the plaintiff and held the said discussion and that he was not involved in the authoring of the letter dated dated 22.6.00. It is equally not possible to state as of fact that the letter was authorized by him or with his knowledge.

The plaintiff's Branch Manager however in the replying Affidavit says the plaintiff had been to the Bank and the issues raised in the disputed letter were indeed the subject of discussion between the Bank and the 1st defendant. One therefore would consider how a Third party would write to the plaintiff's Counsel and refer to issues that would otherwise be confirmed between the parties. The 1st Defendant did not report to the police that the letter had been forged. However, there is a defence on record and I note two issues have been raised. The first one is that the amounts recovered by the Plaintiff on sale of Defendant's motor vehicle have not been taken into account in calculating the Balance due and Secondly that the plaintiff fraudulently sold the 1st Defendant's motor vehicle which plaintiff had valued at Kshs.1,006, 387.68 at a lower price of Kshs.450,000/=. In light of the said defence, it is clear there are serious issues raised and that need to be addressed in the interest of justice. This is subject to the 1st Defendant providing acceptable security for the outstanding amount to be deposited with the Court within 6 days from the date of this Ruling. In default the application shall be deemed as having been allowed with costs.

Dated and Delivered at Mombasa this 4th day of April, 2002.

**P.M. TUTUI**

**COMMISSIONER OF ASSIZE**