



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. 431 OF 2010**

**JARED KANGWANA.....PLAINTIFF**

**THE MONARCH GROUP LIMITED.....PLAINTIFF**

**- VERSUS -**

**SAMSON KEENGU NYAMWEYA.....1<sup>ST</sup> DEFENDANT**

**BOKIN HOLDINGS LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application dated 16<sup>th</sup> June 2014 seeks two substantive reliefs. First, it seeks the striking out of the Defence which had been filed in court on 13<sup>th</sup> May 2013.
2. Secondly, the application requests for judgment to be entered against the defendants, in the sum of Kshs. 6,500,000/-, together with interest.
3. The application was prompted by two things. In the first instance, the Court had directed the defendants to file and serve both their Witness Statements and their Bundle of Documents within 21 days. Considering that that order was made on 5<sup>th</sup> November 2013, and because the defendants had failed to comply with it, the plaintiffs expressed the view that the defence ought to be struck out.
4. Meanwhile, as regards the quest for judgment, the plaintiff pointed out that the claim emanated from a transaction for the sale of land. The 2<sup>nd</sup> defendant is said to have sold some land to the plaintiff.
5. In accordance with the Terms and Conditions of the Sale Agreement, the plaintiff paid to the 2<sup>nd</sup> Defendant the sum of Kshs. 6,500,000/-. That amount constituted 10% of the agreed purchase price.
6. The transaction did not go through, as the defendants were said to have been unable to convey the land to the plaintiff.
7. It is in those circumstances that the plaintiff thereafter filed suit to recover the money he had paid to the defendants.
8. The plaintiff has exhibited a total of fourteen (14) cheques, whose face value is Kshs.7, 500,000/-.
9. The plaintiffs have also shown to the court a letter written on the letter-head of the 2<sup>nd</sup> Defendant, **BOKIN HOLDINGS LIMITED**, dated 20<sup>th</sup> November 2013. The said letter was signed by the 1<sup>st</sup> Defendant, **SAMSON KEENGU NYAMWEYA**.
10. By that letter, the defendants made reference to a meeting that had been held between Mr. Jared Kangwana and Mr. Sam Nyamweya.

11. The letter states that it had been agreed that the defendants would pay a total of Kshs. 7.5 million, without interest. The payments were to be made by monthly instalments of Kshs. 500,000/- each, with effect from November 2013.
12. The cheques were then attached to the letter, and then dispatched to Mr. Jared Kangwana.
13. The 1<sup>st</sup> Defendant has told the court that only two (2) of the cheques were honoured. All the other cheques were dishonoured.
14. The affidavit disclosing the foregoing information was served upon the defendants' lawyers on 23<sup>rd</sup> June 2014.
15. Thereafter the application came up for hearing on 28<sup>th</sup> July 2014. In effect, it was more than one month after the application was served upon the defendants, that the said application came up for hearing. However, the defendants had not filed any replying affidavit or any other response.
16. On 28<sup>th</sup> July 2014, the defendants' advocate was absent from court when the case was first called out. Nonetheless, the court set down the application for hearing at 12.40 p.m.
17. When the case was called out again, at 12.50 p.m, the defendants were represented by Mr. Odongo advocate, who informed the court that he was holding brief for Mr. Nyachoti advocate.
18. The court was told that Mr. Nyachoti had just been instructed by the defendants during the weekend preceding the date when the application was scheduled for hearing.
19. As Mr. Nyachoti needed more time to enable him retrieve the files from the advocate who had been representing the defendants, Mr. Odongo applied for an adjournment.
20. Mr. Makori, the Learned advocate for the plaintiffs, drew the attention of the court to the fact that that Mr. Nyachoti advocate had not come on record as the advocate for the defendants.
21. A perusal of the court records revealed that the advocates who were on record, as representing the defendants, was that of Amolo & Kibanya Advocates.
22. As that law firm had been served more than a month before the application came up for hearing, I held the view that the adjournment which the defendants were seeking, was not justifiable. I therefore rejected the request for an adjournment.
23. Thereafter, Mr. Odongo advocate told the court that he had nothing to say in response to the application.
24. In the circumstances, I find and hold that the application dated 16<sup>th</sup> June 2014 was unchallenged.
25. In any event, the supporting affidavit disclosed sufficient documentary material to prove the plaintiffs' claim in its totality.
26. The defendants received money from the plaintiffs. The said money was the consideration for the contract in which the defendants were selling land to the plaintiffs.
27. As the defendants failed to convey the land to the plaintiffs, there was a total failure of consideration. Following the failure by the defendants to provide the plaintiffs with the land which was the subject matter of the Sale Agreement, the plaintiffs became entitled to a refund of their money.
28. The defendants acknowledged their indebtedness to the plaintiffs, and proceeded to issue a proposal for repayment. A total sum of Kshs. 7,500,000/- was agreed upon; and the defendants issued cheques to the plaintiffs. However, only two (2) cheques were honoured. The cheques for the balance of Kshs. 6,500,000/- were dishonoured.
29. In the light of the express acknowledgement of the debt, through the letter dated 20<sup>th</sup> November 2013, coupled with the cheques which the defendants issued, I hold that the defendants have no defence to the plaintiffs' claim.
30. I therefore enter judgment in favour of the plaintiffs in the sum of Kshs. 6,500,000/-. For the avoidance of any doubt, that is the sum which is still due and owing to the plaintiffs after giving credit for the sum of Kshs. 1,000,000/- which the defendants have already paid.
31. The said sum will attract interest at court rates from the date of judgment until it is paid in full.
32. The costs of the application and the costs of the suit are awarded to the plaintiffs.
33. Having granted judgment in favour of the plaintiff, on the grounds that the debt was duly admitted, I find no reason to strike out the Defence.
34. If I had not granted judgment on admission, I would not have struck out the Defence. Instead, I would have been more inclined to order that the defendants be precluded from calling any witnesses and also from relying on any documentary evidence. In my considered view, a party who fails to comply with Directions requiring him to file and serve Witness Statements or its

- Bundle of Documents should not be permitted to use any witness or documentary evidence. The net effect would be to shut out the evidence which the party could otherwise have produced.
35. However, the opposite party may still have the onus of leading evidence to prove his claim. Of course, when the opposite party cannot call evidence to rebut the evidence of the other party, then it becomes much easier to prove the case. However, I do not think that just because the opposite party is unable to call evidence, it can be presumed that the case against him will always be proved. It is possible that the party making a claim could still fail to prove his claim.
36. By making this point, I am not stating that when a party fails to comply with pre-trial Directions, a court cannot ever strike out the pleadings of that party. I acknowledge the fact that in appropriate cases, the court could be persuaded that the interests of justice warrant the striking out of pleadings.

**DATED, SIGNED and DELIVERED at NAIROBI this 6<sup>th</sup> day of November 2014.**

**FRED A. OCHIENG**

**JUDGE**

***Ruling read in open court in the presence of***

.....for the 1<sup>st</sup> Plaintiff

..... for the 2<sup>nd</sup> Plaintiff

.....for the 1<sup>st</sup> Defendant

.....for the 2<sup>nd</sup> Defendant.

Mr. C. Odhiambo, Court clerk.