



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION - MILIMANI
CIVIL SUIT NO. 2533 OF 1997

LALCHAND FULCHAND SHAH.....1ST PLAINTIFF

RAMBHABEN LALCHAND SHAH 2ND PLAINTIFF

VERSUS

INVESTMENTS & MORTGAGES BANK LIMITED
DEFENDANT

RULING

Introduction:

1. This is an old matter. It was commenced by the filing of a suit by Plaintiff on 8th October 1997. Since then the Plaintiffs have brought numerous applications all of which have been decided upon and in the case of the earliest (application to prevent sale by the mortgagee) has even been adjudicated upon by the Court of Appeal. On each occasion the Plaintiffs have been unsuccessful (save for the minority decision in the Court of Appeal) and various Judges have made findings upon credibility and veracity.
2. The Application now before the Court is brought by the Plaintiffs. It is dated 15th October 2014 and was filed on 16th October 2014. The Application was heard on 12 May 2015 and not 18 March 2015 as the Plaintiff's representatives have repeatedly asserted in correspondence. The Plaintiffs are anxious about what they see as a delay in delivery of this Ruling and that is regrettable. However, in view of earlier findings, it is important that the current application is considered carefully on its own merits in so far as they are not res judicata. That is more time consuming exercise than the alternatives.
3. The most recent previous application was filed on 6 March 2012 and heard on 4th April 2014 and sought to amend the Plaintiff and/or disqualify the Firm of Walker Kontos Advocates from acting for the Defendant. The matter had previously been allocated to Hon. Havelock J. and upon his retirement it was allocated to this Court. Shortly before he retired, Justice Havelock delivered his Ruling on 19th June 2014 in relation to the Plaintiffs earlier application which sought an Order that the firm of Walker Kontos Advocates be ordered to disqualify themselves and withdraw from acting for the Defendant in this suit. Hon. Justice Havelock dismissed the application with costs to the Respondents. He also granted leave to Appeal. It seems the Plaintiffs did not appeal.

4. The Court records shows that the Parties were then to prepare for the Mention for Pre-trial on 5th December 2014. The Plaintiff's filed their current application on 16 October 2014 and somehow managed to obtain a date for the hearing of the Application (27th November 2014) which was before the Pre-trial Hearing. Surprisingly, the hearing date was given without any allowance being made for the Respondents to be given an opportunity to reply to the Application. There was no mention date given for the taking of directions. In the interests of a fair hearing and transparent procedure such an opportunity to reply is essential. The date for "pre-trial" had to be vacated and directions given. The Notice of Motion was endorsed with the phrase "Hg 5th December 2014", notwithstanding the earlier date given.

5. On the day of hearing (27th November 2015) Directions were given for the filing of Replying Affidavits and written submissions. The Parties were ordered to get a date for highlighting from the Registry. The Record shows that the date given initially was 12 March 2015. In fact, the Parties highlighted their cases on 12th May 2015.

6. In summary the Plaintiff's latest application seeks Orders for the joinder of: (1) The firm of Walker Kontas Advocates; (2) The Chief Land Registrar and (3) Joseph Mwangi Kanyongo as Defendants to the suit. It also seeks leave to amend the Plaintiff in the terms of the Draft Amended Plaintiff exhibited to the Supporting Affidavit. Unfortunately that draft pleading seems to have been omitted from the version served on the Parties.

7. The Application is brought by a Notice of Motion under **Order 1 Rules 10(2), Order 8 Rules 3 and 5 and Order 51 Rule 1 of the Civil Procedure Rules 2010 as well as Section 1A, 1B, 3A ad 63(e) of the Civil Procedure Act** as well as the inherent power of the Court and all enabling provisions of the Law. The Application seeks Orders that:

1. *This Honourable Court be pleased to grant leave to the Plaintiffs/Applicants to join the firm of Walker Kontos, Advocates, the Chief Land Registrar and one Joseph Mwangi Kanyongo as 2nd, 3rd and 4th Defendants respectively in this suit;*
2. *This Honourable Court be pleased to grant leave to the Plaintiffs/Applicants to amend the Plaintiff dated the 7th day of October 1997 in the manner set out in the Draft Amended Plaintiff annexed to the Supporting Affidavit hereto sworn by Lalchand Fulchand Shah.*
3. *Costs of this Application be provided for.*

8. *The Applicatin is "grounded" on the Affidavit of Lalchand Fulchand Shah the First Plaintiff and is based on the grounds listed and "other grounds to be adduced at the hearing". Those listed were:*

(1) Following the filing of a List and Bundle of Documents by the Defendant on the 13th day of March 2012, the Plaintiffs/Applicants discovered that there was another set of fraud that was perpetrated by the offices of Walker Kontos Advocates and the Chief Land Registrar.

(2) Acting or purporting to act on the instructions of the Defendant herein, the firm of Walker Kontos Advocates took advantage of, and abused its position as common advocate for the Defendant and ABN Amro Bank, to which the suit property was at the time charged, to fraudulently procure and obtain another discharge of Charge from ABN Amro Bank without the Applicants' consent and while the Applicants were holding the original Discharge of Charge.

(3) In the process of fraudulently procuring and obtaining the said Discharge of Charge, the Defendant gave an Indemnity to ABN Amro Bank to execute and issue to the Defendant another Discharge of Charge on the pretext that the original Discharge of Charge was lost when in fact it was in the possession of the Applicants.

(4) The Charge in favour of the Defendant was fraudulently registered by the Defendant in collusion with the intended 2nd and 3rd Defendants since the suit property was clearly encumbered, and in any event, the consent of ABN Amro Bank as first Chargee was not first had and obtained.

(5) *The Applicants suffered immense loss and damage as a result of the illegal and fraudulent actions of the parties aforesaid.*

(6) *As a consequence of the fraud perpetrated as aforesaid, the 1st Defendant had no legal interest or estate in the sui property capable of being transferred to the present registered owner, the intended 4th Defendant herein, one Joseph Mwangi Kanyongo in purported exercise of a power of sale or at all.*

(7) *The intended 4th Defendant had in turn, no legal interest or estate in the suit property to create a Charge in favour of the Defendant herein as the registration of the intended 4th Defendant s proprietor of the suit property was a nullity ab initio.*

(8) *It is just and fair that for the real issues in controversy to be properly determined, the Applicants be granted leave to join the intended parties as 2nd, 3rd and 4th Defendants respectively and amend the Plaint as proposed.*

(9) *The firm of Walker Kontos Advocates, the Chief Land Registrar and one Joseph Mwangi Kanyongo ought to be joined as Defendants in this suit as their presence before court is necessary for the court to effectually and completely adjudicate upon and settle all questions involved in the suit.*

(10) *The Defendant and the intended 2nd, 3rd and 4th Defendants stand to suffer no real prejudice that cannot be compensated by an award of costs as they will have an opportunity of being heard on their respective defences.*

9. In addition to the Grounds set out in the Application the Applicants seem to rely on the matters they say were only discovered after disclosure by the Defendant of its List and Bundle of Documents on 13th March 2012. However prior to that the Plaintiff had commence criminal proceedings wherein the investigating officer swore an affidavit. The Affidavit in Support and the Supplementary Affidavit is sworn by the First Plaintiff. The Second Plaintiff appears to have neither confirmed nor denied that she is in agreement with the Application and the supporting evidence.

10. The Application is opposed by the existing Defendant and the Second, Third and Fourth Respondents. The Defendant opposed the Application on the ground that it is frivolous misconceived, vexatious and amounts to an abuse of the process as well as being a device intended to delay the hearing of the suit. The Bank also states that the proposed 4th Defendant is already deceased and that no draft amended plaint was annexed to the Application. The Grounds of Opposition state;

1. *The application is frivolous, misconceived, vexatious and amounts to an abuse of the Court process and should be dismissed.*
2. *The proposed amendment is intended to delay the hearing of the suit which has already been set down for hearing on 27th November 2014.*
3. *The proposed 4th Defendant one Joseph Mwangi Kanyongo is deceased.*
4. *No draft amended plaint is annexed to the present application.”*

11. The Second Respondent/Intended Second Defendant firm has also filed Grounds of Opposition. In those Grounds they raise numerous issues. They state:

(1) *“The entire application is misconceived, frivolous, vexatious and totally unmerited as the applicants have not established sufficient cause or locus for the grant of the Orders sought.*

(2) *As admitted at paragraph 14 of the supporting Affidavit of Lalchand Fulchand Shah, the Applicants are on a fishing expedition as they have previously unsuccessfully*

sought to have the Firm of Walker Kontos Advocates disqualified from representing the Defendant in this suit.

(3) *This current application is a veiled attempt by the applicants to have a second bite at the cherry after failing previous attempts to have the Firm of Walker Kontos Advocates disqualified.*

(4) *The Application comes more than 15 years after the suit was instituted and is therefore an afterthought and an attempt to stifle the Defendant's effective representation and Defence in this suit.*

(5) *There is no basis for the amendments sought.*

(6) *The amendments now seek to introduce new causes of action of an entirely different character inconsistent with the original cause of action and which is time barred.*

(7) *Any cause of action arose in the year 1997 when the charge was created and registered and any claim to introduce a new defendant now is time barred. The Plaintiffs had all along known the identity of the advocates who had drawn the charge documents and cannot now bring in a time-barred claim.*

(8) *The intended amend (sic) of the Plaintiff will in no way assist this Court in determining the points in issue but will only complicate and further delay the determination of this suit which has been pending for over 15 years.*

(9) *It is admitted in paragraph 7 of the supporting affidavit of Lalchand Fulchand Shah, the Plaintiff has previously unsuccessfully made applications to amend the plaintiff and enjoin another party. This instant application is therefore res judicata and an abuse of the process of this court.*

(10) *The Application is based on merely speculative grounds with no basis for the allegations therein.*

(11) *Allowing the application will have the effect of setting aside previous proceedings and having the matter start afresh after more than 16 years since the suit was instituted.*

(12) *The Application is an abuse of this Honourable Court's process and should be dismissed with costs."*

The Intended Second Plaintiffs also filed written submissions on 10 March 2015.

12. The Third Respondent has not participated in these proceedings. The Fourth Respondent named in the Application is deceased. The Plaintiffs were ordered by this Court on 27 November 2014 to serve the application on his Executors/Personal Representatives. They have filed a Replying Affidavit sworn by Daniel Waithanji Mwangi who says he is the administrator of the Estate of Joseph Mwangi Kayongo. He says that he believes the application is misconceived, frivolous, vexatious and an abuse of the process of the court. He says that the Intended Fourth Defendant has long been deceased and has exhibited the Certificate of Confirmation of Grant which lists the suit property as one of the assets. That Grant is dated 11 April 2013.

13. The first limb of the Plaintiffs' Application seeks the joinder of three named parties as defendants to the suit. I will deal with issues relating to each of the intended defendants separately below. The Plaintiffs seek joinder pursuant to **The Civil Procedure Rules 2010. Order 1** deals with the issue of parties to a suit. **Order 1 Rule 3** provides "All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is

alleged to exist, whether jointly or severally or in the alternative, where if separate suits were brought against such persons any common question of law or fact would arise.” Clearly the issue in dispute within the Plaintiff relates to the Charge and subsequent sale of the Charged property. **Order 1 Rule 7** provides *“Where the plaintiff is in doubt as to the persons from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties”*. That is at commencement of the suit. **Order 1 Rule 10** which provides for the substitution and addition of parties subsequently. **Rule 10(2)** relates to defendants. It provides: *“The Court may at any stage of the proceedings, either upon or without the application of either party, on such terms as may appear to the court to be just, order that the name of any party improperly joined whether plaintiff or defendant, be struck out and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit, be added.”* The test there set out is that the presence before the court of the person joined may be necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit. As the suit is currently pleaded, the joinder of the Second to Fourth Respondents is not necessary for the Court to decide the issues between the Bank and the Plaintiffs. In relation to the Second Respondent a previous attempt to involve them as witnesses was unsuccessful.

14. However, the Plaintiffs are also seeking to amend the Plaintiff and the argument appears to be that the joinder of the Second to Fourth Respondents is necessary for the court to effectually and completely adjudicate upon and settle all questions involved in the suit. **Order 8 Rules 3 and 5** are relied on by the Plaintiffs. **Order 8 Rule 1** provides inter alia; *“(3) Where an amended defence is served on a plaintiff*

a. if the plaintiff has already served a reply on that defendant, he may amend his reply; and

(b) the period for service of his reply or amended reply is fourteen days after the service on him of the amended defence.

Order 8 Rule 3 provides: *“Amendment of pleading with leave*

(1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.

(2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.

(3) An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.

(4)

(5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.

And **Order 8 Rule 5** provides: *5(1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.....*

15. The Plaintiffs also filed a “Supplementary Affidavit” dated and filed on 22 December 2014. In it Mr Shah says that he has had explained to him by his Advocates the Grounds of Opposition filed on behalf of the Intended Fourth Defendant. In fact none were filed. The Estate of the Intended Fourth Defendant filed a Replying Affidavit. The First and Second Respondants did file Grounds of Opposition as set out above. The First Plaintiff states that he believes the causes of action arose upon discovery of the new evidence. The new evidence is listed at paragraph 6 of the Supplementary Affidavit and can be summarised as:

- (1) Two versions of the Charge dated 29th April 1997. The second version is said to have been discovered by the Plaintiffs on 13th March 2012;
- (2) The existence of a Deed of Indemnity between the Defendant and ABN Amro Bank
- (3) A second set of the Discharge of Charges dated 19th July 1997 while the Plaintiffs were holding another unregistered Discharge dated 12th November 1993.

16. Paragraph 7 states that if the Plaintiffs were aware of the facts and matters now within their knowledge they would have included them in the original Plaint. Paragraphs 12 and 13 confuse the Grounds of Opposition of the First and Second Respondents but state that the contents of the Plaintiffs grounds are “*not speculative as to the authors of the documents in issue and the contents thereof are explicit as to who the perpetrators of the fraud were, and the nature of the said fraud is explicitly evident in the said documents.*”.

ISSUES

17. The issues which then arise for resolution are:

1. Should the Intended Defendants or any one of them be added to the suit.
2. Was the Defendant entitled to
 - a. A charge on the suit property and
 - b. register that charge?
3. Did the intended fourth defendant purchase the property
 - a. At public auction or
 - b. From the Defendant itself passing on what title it did held?
4. Has there been an inordinate delay in bringing this Application?
5. Was the Instrument of Charge obtained by fraud, if so who were the perpetrators?
6. Was the registration of the charge fraudulent.
7. Does the existence of the Deed of Indemnity demonstrate fraud?
8. Will there be any prejudice suffered by the intended Defendants if the Application is granted, if so what prejudice?
9. Is the Applicant’s challenge to the Respondents realization of the security.
 - a. A valid application and
 - b. Made on good grounds that are likely to succeed.

10. Were material particulars of the charged changed without the Plaintiff’s/Applicant’s knowledge?

11. Have the Applicants suffered “immense loss and damages” as a result of the alleged fraudulent and/or illegal activities.
12. In the circumstances is it appropriate in fact and/or law for the Defendants to be added to these proceedings.
13. What are the amendments sought?
14. Do they amend existing causes of action or attempt to add new ones?
15. Is the amendment outside the limitation period.
16. Does the Application delay the main suit.
17. Did Walker Kantos Advocates procure another discharge from ABN AMZO without the Applicant’s consent?
18. If so was that consent necessary?
19. Was the replacement done fraudulently? And if so by whom?
20. Have the Plaintiffs satisfied the evidential burden of proving fraud on a prima facie basis?

18. Dealing with the issues relating to each Intended Defendant separately and in reverse Order. The Application against the Fourth Defendant, is in summary, that the First Defendant Bank could not pass good title because “*the First Defendant had no legal interest or estate in the suit property capable of being transferred to the present registered owner*”. The Bank itself did not sell the Property but it was auctioned pursuant to its right of sale . The only relief claimed against the proposed fourth defendant is rectification of the title relating the Suit property (LR. NO. 209/66/41) IR NO. 39774). The Grounds on which joinder of the Deceased is sought are the fourth defendant was not a valid proprietor of the suit property and therefore was not in a position to charge the property to the Defendant.

19. Those grounds demonstrate absolutely no reason why the Deceased or his estate (to use the correct factual position). Should be joined. The charging of the property by a buyer at auction is too remote from this application. It should be mentioned that the Plaintiffs did not file an Application to join the Estate of the Deceased plaintiff, the Deceased was not alleged to have participated in the alleged fraud.

20. Mr. Kanyongo is deceased. However, it appears that he was alive at the time the plaintiffs instituted their CID’s investigation of this matter. Taking as my starting point, the Plaintiffs filed in Court an affidavit of Service dated 27th October 2015 (11 days after issue of the application) claiming to have served the application at the “*the residence of the Deceased*”. The Affidavit states that “the wife of the deceased said she was not available for service”. The Affidavit stops there. It does not tel us whether she explained why he was not available. Further she is said to have accepted service “*on behalf of her husband*”. Susan Wanjiru Mwangi is not named as a personal representative of the Deceased. In the circumstances I find that affidavit to be a deliberate attempt by the Plaintiffs to create a false impression and to mislead the court on the issue of service on the Fourth Respondent.

21. That the very highest if the Plaintiffs were to succeed against against the Second and Third Respondents, the Indented fourth Defendant’s estate would become an interested party at that stage. There is very real prejudice if there was joinder at this stage. That is not limited to the stress and cost of being involved in litigation for no good reason. There is potential for the Fourth Defendant to be tainted by the allegations of fraud. In addition if previous conduct is anything to go by, it promises to be protracted. There is further prejudice by delay . A stark example is that the Deceased will not be able to testify on his own behalf.

22. Dealing with the proposed third Defendant next. The Plaintiffs seek to join the Third Defendant. The allegations against the proposed Third Defendant (The Chief Land Registrar) was that there was “another set of fraud”. Perpetrated by the offices of Walker Kontos Advocates and the Chief Land Registrar. That is a positive assertion against “the whole of the respective offices”. When asked, during highlighting, which individuals were alleged to be involved, counsel for the Plaintiffs stated that claim was against the entirety of the two offices. Grounds 4, 8, 9 and 10 of the Application relate to the Chief Land Registrar colluded with the Defendant to fraudulently register the change.

23. As stated above there is Supporting Affidavit sworn by the First Plaintiff. He also swore a Supplementary Affidavit. There were also previous proceedings. In Grounds 3 of the previous

Application the First Plaintiff goes on to allege that as the Suit Property was clearly encumbered and the consent of ABN Amro Bank as first chargee was not obtained the registration was therefore fraudulent. Now that it has become clear that the consent of ABN Amro was obtained, it seems that Plaintiffs' case has adapted to move the alleged fraud to the actual registration. That suggests "mission creep". The Plaintiffs have not identified any individual at the Chief Land Registrar's office who perpetrated the fraud. Further, there has been no application for rectification of the title.

24. In fact the validity of the charge and subsequent registration on the interlocutory stage as already been raised at least once in prior proceeding. The outcome was that neither the Judge of the High Court nor two Judges of the Court of Appeal felt there was any basis to the argument. The Plaintiffs and their lawyers knowing full well that the matter is res judicata not claim to raise the same argument supposedly on new grounds. That raises the question of whether those grounds were known at the time of that application or earlier.

25. At Paragraph 5 of the Supplemental Affidavit the First Plaintiff says that he obtained legal advice that the Cause of action arose upon discovery of the new evidence. That preposition is incorrect in law. A Cause of action arises when the facts complained of occur. The issue of discovery of the pertaining facts is only relevant to the question of when the limitation period begins to run. It then goes on to say that the documents were in the possession of the Defendant. It seems that statement is incorrect as both Parties included the same version in their list and bundles but a different version was obtained from the Land Registry. Paragraph 4 of the Supplementary Affidavit explains that the amendments are based primarily, that is not solely, based on evidence obtained by the Plaintiffs for the first time following the Defendant's list and Bundle filed on 13th March 2012. That is two years and 7 months earlier. The Plaintiff also claims to conducted an "official search" of the Register in December 2011 (Submissions 10 March 2014)

26. The new evidence relied upon is that there are two versions of the Charge Document at page 23. The first appears as Exhibit 6B (at p101 and the second at P.125) to the supporting Affidavit and Exhibit 6A (p.57). At pages 125 and 76 of those two exhibits are different versions. The first does not contains the encumbrance in favour of ABN Amro Bank and the Second does. Both appear dated the same date, that is, 29th April 1997. That is said to demonstrate the fraud. In fact, the Instrument of Charge that was registered is dated 9th July 1997 (see page 37 of the Exhibit). The Deed of Discharge was also dated 9th July 1997 and the Stamp shows that it was registered on 16th July 1997.

27. Firstly, at that time the Plaintiffs were attacking the Charge they now say is the true. Secondly there is a Deed of indemnity dated 9th July 1997 and a Discharge of Charges which was acquired by the Defendant without the Plaintiff knowing. The Plaintiffs had already been provided with a certificate of discharge dated 12th November 1993 which had the same effect. (LFS 5 page 48).

28. The First Plaintiff says at paragraph 7 of the Supplementary affidavit that if those documents were in their possession they would have raised the issues now being raised, in the original plaint. What the plaintiffs fail to do is to explain what steps were taken by the plaintiffs themselves to obtain the relevant information which was partly in the public domain and partly within their power to obtain.

29. The First Plaintiff explains that after the Defendant filed its list and Bundle of Documents on 13th March 2012 the Plaintiff/Applicants discovered there was "another set of fraud" which was perpetrated at the offices of Walker Kontos and the Chief Land Registrar. However, prior to this Application and the previous Application in March 2012, the Plaintiffs had reported the matter to the Police and there was a CID investigation on foot. The Officer conducting the investigation. The affidavit sworn by Sergeant Patrick Maloba on 30th December 2011 in support of the application for warrants, states at the material parts that; He was duly instructed by the Director of Criminal Investigation Department, to conduct investigations into a fraudulent transaction of a charge dated 6th May 1997 on a property IR 28053 LR 209/66/41 (original number copy hereby attached); that the respondent used the said title for a charge as per entry number 97 presentation 104 dated 6th May 1997 and that he asked the honourable court issue me with warrants to investigate the charge on the said document and obtain certified documents of:

1. The identification of the person who changed document to the bank.
2. The account number where the proceeds were deposited and
3. The account opening documents. Those matters are not new evidence in relation to the Charge and its enforcement which are averred to in the original Plaint abeit then resiled from.

30. Therefore it appears from the criminal proceedings that in 2011 the Plaintiffs were already complaining about what they now claim is the fraud ie the act of someone changing the Instrument of Charge before it was registered and then registering it. It is unclear from the Plaintiffs' supporting affidavit and supplemental affidavit when, how and on what basis they came to the realisation that the perpetrators of that alleged fraud were the Intended Second and Third Defendants. Also it is implausible that a search at the Land Registry was not done during the course of the investigation before it was stayed by the Constitutional Court.

Previous Findings

31. Dealing with the question of the Plaintiffs state of knowledge at various times during these proceedings, it is instructive to consider the Ruling of Hon Kimaru J. In his Ruling dated 18th June 2008, the Learned Judge said;

“Section 107 and 109 of the Evidence Act places the burnden o them to prove those claims. The standard in a matter of this nature is aily to establish a prima facie case. In my opinion they have not discharged the burden. Even without their obvious credibility gap, the applicants would stil have great difficulty in establishing the invalidity of the charge because the law is clearly against them..... *The Applicants also attack the charge and the First Respondent's attempt to realize the security created thereby on the following further grounds:-*

- a. *The Respondent have failed to provide to the applicants information on the account purportedly created pursuant to the charge;*
- b. *The respondent has not made any serious attempt to recover the sum claimed from the applicants;*
- c. *The charge does not reflect any true borrowing by Shah Motors Limited;*
- d. *The charge is for no consideration;*
- e. *The account secured by the charge was not operated in accordance with its terms;*
- f. *Material particulars of the charge were altered without the Plaintiff's knowledge and/or consent and*
- g. *The matters detailed in the Plaint set out further grounds. The Affidavit in support was sworn by the 1st Plaintiff.*

No evidence has been tendered to substantiate the last two grounds in the Notice of Motion and quite clearly they deserve no further consideration. As for there being no consideration for the charge, two observations are called for. Firstly, it is common ground that as at the time of creating the charge, a substantial amount in excess of the said sum Shs.30 million secured by the charge, was owed by Shah Motors Limited to the respondent. The charge was created to secure Shs.30 million of that debt. As far as I am aware there is no law, and none has been put before the Court, that bars the creation of a charge to secure an existing loan or debt.”.

32. The Plaintiffs, as is stated in the Supplementary Affidavit are fully entitled to instruct Advocates of their chosing and they have done exactly that in the past. The pleadings are Rulings and Judgment show a variety of representation what is also unclear is why there should be the inordinate delay between the supposed disclosure and discovery of “ new facts” and the current application, that is about 2 ½ years. One would expect that if they truly haboured the serious concerns they now assert they would have acted with a little more alacrity.

33. The proposed 4th Defendant is deceased. In 2012 his personal Representative applied for a grant of probate. That grant was confirmed on 11th April 2013 in other words about 2 years and 6 months before the current Application. He had purchased the suit property in 2001.

Plaintiff's Submissions

34. In the Submissions on behalf of the Plaintiffs recorded that the three Intended Defendants oppose the Application. It is said the proposed second Defendant filed Grounds of Opposition dated 11th December 2014, which is correct. It is then said the proposed Fourth Defendant filed Grounds of Opposition dated 26th November 2014. It is said that none of them filed Replying Affidavits. It is further said that the proposed Fourth Defendant has neither appointed Counsel nor filed any reply. These submissions are dated 20th January 2015 and signed on behalf of Amolo and Kibanya.

35. It is always concerning when representing advocate takes upon him or herself the client's role as the source of evidence. It is particularly concerning when these statements turn out to be incorrect. The factually correct position is that the Intended Fourth Defendant's filed a Replying Affidavit from the personal representatives as directed by the Court. It is that document on which the Estate relies. There are no Grounds filed by the proposed Defendant. There are Grounds of Opposition filed by Walker Kontos Advocates on 11 December 2014 and Grounds of Opposition filed on 26th November 2014 on behalf of the Defendant Bank filed by Amolo Gachoka. The document is very succinct and lists 4 grounds dealt with below.

Plaintiffs' List of Authorities

36. The Plaintiffs have also filed a List of Authorities including:

1. The Civil Procedure Act (Chapter 21 of the Laws of Kenya) and the Civil Procedure Rules, 2010 made thereunder.
2. The Limitation of Actions Act (Chapter 22 of the Laws of Kenya).
3. The Land Registration Act, 2012.
4. John Gekanana Mosigisi- vs- Aloys Ratemo Siro & Another- HCCC ELC NO. 105 of 2013 (2014) eKLR (Kisii).
5. Lilian Wairimu Ngatho & Another –vs- Moki Savings Co-operative Society Limited & Another – HCCC ELC NO. 745 of 2001 (O.S.) (Kisii) (2014) eKLR.
6. Hiram Bere Kinuthia & 2 Others – vs- Edick Omondi & 3 others HCCC ELC NO. 160 of 2011 Nairobi (2004) eKLR.
7. John Gitau Mungai –vs- Stephen Thuku Kabebe & 3 Others HCCC ELC NO. 65 of 2012 (Malindi) (2014) eKLR.
8. Justus Tureti Obara –vs- Peter Koipeitai Nengisoi – HCCC ELC NO. 126 of 2011 Kisii (2014) eKLR.

37. I have read through the Authorities provided by the Plaintiff's and appearing on their list. I taken into account the principles set out therein. In relation to the first case, **John Gekanana Masigisi vs. Adys Ratemo Siro & Another. HCCC ELC NO. 105 of 2015 (2014) eKLR (Kisii).**

38. . That case is distinguishable on the facts. In that case, the person to whom the property was transferred was a close member of the family. In the case before me the intended Fourth Defendant was firstly a bona fide purchaser for value without notice for the wrong doing. There is no evidence or allegation within the draft amended plaint that he was complicit in or had notice of any of the conduct now complained of a fraudulent. Further the intended 4th Defendant is deceased and so handicapped as to participation in the proceedings. The Court exercises a discretion under Order 10 based on the facts before it. In relation to **Lilian Wairimu Ngatho & Another vs. Maki Savings Co-operative Society Ltd & Another HCCC ELC NO. 754 OF 2001.** The only part of this authority that is highlighted is the extract from Order I Rule 10(2) which states that joinder can be made at any stage of the proceedings. The Respondents do not appear to be challenging that contention. What they are challenging is the repeated attempts by the Plaintiffs to change their case and the delay.

39. .Given the age of this case, it is inevitable that issues of limitation would arise and they do. The Plaintiff has not dealt with the specifically either in the Application or in Submissions. Their List of

Authorities has simply listed the entire Act as one of their authorities. That approach is of limited assistance.

40. Although the Plaintiff's Application is made, in part, under the guise of an amendment to the Plaintiff's Supporting Affidavit paints a different picture. At paragraph 24, the First Plaintiff states, "*THAT the facts giving rise to the new causes of action only came to my knowledge in March, 2012 when the Defendant files its List and Bundle of Documents herein and they are totally different and distinct from those that had been declined on 18th June 2008 when the 2nd Applicant and I sought to join Harith Sheth Advocate.*" The delay is attributed to the Constitutional Petition brought on 28th March 2013 (paragraph 25) and the need to obtain "good and proper legal counsel". It should be mentioned that the Plaintiffs have been represented throughout albeit by different Advocates. The current Advocates seem to have been acting in this role since 2011.

41. In their List of Authorities, the Plaintiffs rely on the **Land Act 2012**. The facts and matters in dispute in this suit arose in 1997. Therefore, an analysis of the applicable law at that time is essential. They also rely on the whole of the Limitation Act which provides for different periods for different causes of action as well as different rules applicable to the extension of limitation periods.

42. Although the Submissions on behalf of the Plaintiffs are premised in part on the **Land Act 2012**, it should be borne in mind that by virtue of the age of this dispute the prevailing law at the time was not the **Land Act 2012** (which did not exist at the time) but the Registration of Titles Act. The certificate on page 24 of the Charge sets out that Harith Sheth, Advocate of the High Court of Kenya explained to the Chargee the effect of **Section 69 and subsection (1) of Section 100A of the Transfer of Property Act 1882 of India as incorporated by the Indian Transfer of Property (Amendment) Act 1959**. The Plaintiffs denied that and were disbelieved. **Section 69 (1)** aforesaid provides:

"69(1) A mortgagee, or any person acting on his behalf where the mortgage is an English mortgage, to which this section applies, shall, by virtue of this act and without the intervention of the Court, have power when the mortgage-money has become due, subject to the provisions of this section, to sell, to concur with any other person selling, the mortgaged property or any part thereof, with or without subject or prior encumbrances or not and either together or in lots by public auction or by private contract...."

Section 100A provides that a chargee under a charge executed in accordance with the provisions of Section 46 of the Registration of Titles Act and duly registered shall have the right to obtain possession etc.

43. On the question of whether the Chief Lands Registrar was fraudulent in registering a discharge, **Section 47 of the Registration of Titles Act** provides for the Discharge of a charge. It provides inter alia that "*Upon the production of any charge having thereon an endorsement signed by the chargee and attested in the manner prescribeddischarging the land from the whole or part of the money secured, orupon proof of the occurrence of the event upon which in accordance with the provisions of any charge, the money thereby secured shall cease to be payable and upon proof that all arrears have been paid, satisfied or discharged, **the registrar shall make an entry in the register** noting that the charge is discharged wholly or partially, or that part the land is discharged or that the charge is satisfied and discharged as the case may require...."* (emphasis added) . In the circumstances, the Registry had little choice in the matter.

44. If the Plaintiffs were indeed as concerned as they now say that there were incorrect or fraudulent entries on the Register, the correct procedure would be for them to make an application to the Registrar of Titles for either rectification of the title, cancellation of entries or correction of instruments under the **Registration of Titles Act**. Section 60(1) of that Act provides that "*where it appears to the satisfaction of the registrar that a grant, certificate or title or **other instrument has been issued in error**, or, or that an entry or endorsement has been made in error on any grant, certificate of title or other instrument, or that a grant, certificate, instrument, entry or endorsement has been fraudulently or wrongfully obtained, or that a grant, certificate or instrument is fraudulently or wrongfully retained, he may summon*

the person to whom the grant or certificate or instrument has been issued, or by whom it has been obtained or is retained, to deliver up for the purposes of being corrected” Although the Act provides for a procedure through the Lands Registry, It should also be borne in mind that the court retains jurisdiction on the ground of “actual fraud” (**Section 75 RTA**). However, for a fraud to be actual it needs to be set out clearly.

45. The evidential burden is on the Plaintiffs. They have to prove their case. The first question to be resolved is, was the Instrument of Charge changed. As there are two versions of the Instrument of Charge available – one registered and the second in the possession of the Parties and their advocates. The answer is obvious. The second question is – was that done without the knowledge of the Plaintiffs. That is unlikely as both Plaintiffs have signed both versions of the Instrument of Charge the one that omits the previous charge in favour of ABN Amro Bank and the other. The Plaintiffs have already challenged that signature by alleging that the Advocate named did not explain the implications of the Charge to them. They were found to be untruthful and their application was dismissed with costs. Furthermore, under the **Registered Land Act** which was in force at the time, the Charge could not be registered without the participation of the Plaintiffs.

46. The next question is, were the changes made fraudulently? The Plaintiffs have failed to identify a single individual natural person who did or could have perpetrated the fraud. What is alleged is that the “Offices” of the Firm of Walker Kontos and the “Offices” of the Chief Land Registrar perpetrated the fraud. As to the dates when the fraud is alleged to have been perpetrated. Again the allegation is vague and general. The Court has to look at the facts alleged to ascertain the most likely and/or plausible scenario at the time of registration. Part VIII of The Registration of Titles Act relates to charges. Section 46 provides (1) Whenever any land is intended to be charged or made security in favour of any person other than by way of deposit of documents of title as provided for by section 66, the proprietor or lessee..... shall execute a charge in form J(1) or J(2) in the First Schedule, which must be registered as hereinbefore provided.

47. In those circumstances, the Charge could not have been registered without the knowledge or participation of the Plaintiffs. That issue has already been adjudicated upon and is *res judicata*. The Court found that the Plaintiffs were aware of the consequences of the charge and that those were explained by Mr Harith Sheth, Advocate and that the Plaintiffs sought to mislead the Court on that issue (Ruling of Hon Kimaru J, 18th June 2008).

48. That brings us to the issue of whether the Charge was changed without the knowledge of the Plaintiffs. As stated above, both versions of the Charge were signed. The fact that there are two versions of a document is not of itself sinister. As any experienced conveyancing lawyer will know, documents are often drafted and then require amendment. In this case the Plaintiffs are not saying that the amendment set forward a state of affairs that was not true. They are saying that they did not know or that the Intended Second Defendant liaised with their own Clients and produced a document that puts forward a true state of affairs. The Plaintiff’s borrowing from ABN Amro Bank had been repaid. The First Plaintiff seeks to suggest that it had not. At paragraph 15 he says, “That I verily believe that the said tampering was done by the firm of Walker Kontos, Advocates in a belated by inconsequential bid to rectify the anomaly and/or illegality of the Charge in favour of the Defendant.”. Paragraph 11 says that it “transpired” that the Firm of Walker Kontos Advocates acted for the Defendant and ABN Amro Bank. In the circumstances, if ABN Amro Bank was willing to discharge the charge in its own favour, then the borrowing had been repaid and they did not wish to continue with the Charge. If the Plaintiff had the certificate of discharge in his possession and did not bring it to the notice of the Defendant, then it suggests that it was he who was concealing the true facts and not registering a document that reflected the reality. Further, if the document had indeed been “tampered” with why did the Plaintiffs sign it? The Affidavit does not explain that. Mr Shah also states that the suit property was clearly encumbered. Even if that were true such encumbrance could not at the instigation of ABN Amro Bank as they told their Advocates as much. In any event the First Defendant gave an indemnity for any unpaid indebtedness.

49. In the circumstances, it is unclear from the Plaintiffs’ Application and Supporting Affidavit where and when and how the fraud is meant to have occurred. In the Intended 2nd Defendant’s Grounds of

Objection, it is said there is no basis for the amendments sought. The amendments seek to introduce a new cause of action for fraud against the Advocates acting for the Chargee. The **Civil Procedure Rules** permit that. Paragraph 6 goes on to say that the new cause of action is time barred, but does not set out which part of the Limitation Act is relied upon to make that assertion.

50. Under the Limitation Act, Section of the Limitation Act, the time limit for actions under a mortgage or charge are generally 12 years. In this case, the new cause of action is brought against two new parties on an allegation of fraud.

51. However, whether or not the limitation period has lapsed or not, the Court still must have regard to the delay in bringing the application and the impact on the intended defendant, as well as the prospects of having a fair trial under the overriding objective and Article 50 of the Constitution. The Plaintiffs filed their suit in 1997. When the suit was filed, the Instrument of Charge that was registered did not contain the charge in favour of ABN Amro Bank. That was a true reflection of the situation. Further, registration provides and is deemed to provide notice to the world at large of the facts and matters therein contained. Therefore the Plaintiffs had notice of the Instrument of Charge as registered since 16 July 1997. Whether or not the Plaintiffs saw a different version (that was not registered) does not take the matter further. However, that denial does go to the credibility of the First Plaintiff. He now says that he first discovered this particular set of fraud after disclosure on 13 March 2012. However, in 2011 he had instituted criminal proceedings where the Second Intended Defendants were to be investigated for none other than, fraud. The similarity is striking. Thereafter there were civil proceedings to disqualify the Second Intended Defendant Firm from continuing to act on the basis that they would need to answer questions under cross examination. Again, the basis was an allegation of fraud. If the Plaintiff is to be believed, following the realisation on 12 March 2012, they did nothing at all, not even apply to amend the application already on foot. That could have been done relatively easily and simply as it had not been heard by then. Hon Havelock J did not rule upon that Application until June 2014.

52. In relation to the allegation that the Intended Second Defendant firm of advocates abused and took advantage of the fact of acting for two banks at the same time, is not a cause of action that the Plaintiff can complain of. If an advocate has abused the trust of his or her client, the cause of action lies with that client. If a third party feels aggrieved by an Advocate following the Instructions of his or her client, there is no cause of action against the Advocates as the agents of a disclosed principal. In relation to the Second Respondent there is also the question of legal professional privilege as the firm acted for the Bank in the transactions.

53. The argument that the Bank could not pass title onto the Intended Fourth Defendant is misconceived. The Plaintiffs are fully aware of the consequence and implication of the declaration of understanding that they signed on page 23 of the Charge. The fact that was the part of the charge to which they brought their first challenge shows they knew of its importance. The Intended Fourth Defendant did not acquire his title through or from the First Defendant but by operation of law.

54. For the reasons set out above, the Application to join the Second Intended Defendant is dismissed. The Application to join the Third Intended Defendant is equally dismissed as having no basis whatsoever. The Application for joinder of the Intended Fourth Defendant is dismissed as being misconceived both in fact and in law as well as being time barred.

55. The Plaintiffs have failed to demonstrate a prima facie case in accordance with the test set out in *Mrao* - *"a prima facie case is more than an arguable case, it is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."* **Per Bosire JA in the Mrao v First American Bank and 2 Others Civ App 39 or 2002** .

56. Further, the inordinate delay in bringing this application militates against the Defendants having a fair trial due to the passage of time the demise of individuals and the inevitability of failing memories as time goes on. 18 years is an inordinate delay. That is an additional reason why the application should be dismissed.

57. In the circumstances, the Application to amend the Plaint in so far as it relates to the First Defendant and the Intended Second and Third Defendant on the question of fraud is dismissed. The amendments that are consequent on the passage of time and are made against the Defendant, in particular in paragraphs 5 (omitting the word “fraudulently”), 6, 8, 9, 10 (limited to the last 2 ½ lines after word “and”), 11 and 13 are allowed.

58. The Application so far as it relates to joinder is equally dismissed.

59. The Plaintiffs to pay the costs of the Application.

Order accordingly,

FARAH S. M. AMIN

JUDGE

DATED 21 December 2015 SIGNED AND DELIVERED AT NAIROBI THIS 21st DAY OF December, 2015.

Coram:

Clerk: Sofia

N/A for Applicant

N/A for 1st Respondent

Mr Ogunde for 2nd Respondent

N/A for Third Respondent

N/A for 4th Respondent
