



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**COMMERCIAL DIVISION**  
**CIVIL SUIT NO. 130 OF 2012**

ARYAN LIMITED .....PLAINTIFF

VERSUS

FIDELITY COMMERCIAL BANK LTD. ....DEFENDANT

MAHENDRAKUMAR CHANDULAL SHAH..... INTENDED 1ST DEFENDANT

KIRTIBALA MAHENDRAKUMAR SHAH..... INTENDED 2ND      DEFENDANT

**RULING**

By way of a Notice of Motion application dated 6th February, 2013 and expressed to be brought under order 1 rule 3 and 10 (2) of the Civil Procedure Rules (2010) and Sections 1A and 3A of the Civil Procedure Rules, the applicant seeks orders to enjoin Mahendrakumar Chandulal Shah and Kirtibala Mahendrakumar Shah the 1st and 2nd intended Defendants herein as the 2nd and 3rd Defendants respectively in the suit.

Secondly, the Applicants so added, be granted leave to file papers to oppose and counter claim on the issues raised in the pleadings therein.

The grounds are that the intended Defendants were the duly registered absolute proprietors of Mombasa/Bock XII/45, the property of which forms part of the suit herein before the purported sale to the Plaintiff by the Defendant.

That the Intended Defendants have challenged the alleged sale of the suit property to the plaintiff in the High Court of Kenya at Mombasa Civil Case No. 212 of 2011 which suit is pending for hearing.

That the issues raised for hearing in the present suit by the plaintiff directly relate to the intended Defendants compromised rights to the Title No. Mombasa/Block XII/45.

That any order made herein may prejudice the intended Defendants Rights in Title No. Mombasa/Block XII/45 and the pending suit therein.

The application is supported by the affidavit of the Mahendrakumar Chandulal Shah.

The Plaintiff also does not oppose the application in question.

The application is opposed. There is a replying affidavit sworn by one Sultan Khimji a Director of the Defendant and filed in Court on the 8th day of May, 2013.

It is deponed that the present suit concerns plot No. Mombasa/Block XX/265A allegedly registered in favour of the plaintiff. This property was charged to the Defendant. The plaintiff defaulted on the charge on that property which is one of the securities to funds borrowed by the plaintiff from the Defendant. The other security being a guarantee by the Directors of the plaintiff.

It is further deponed that the 1st Defendant discovered that the plaintiff's title on plot No. Mombasa/Block XX/265 A is invalid and called for substitution of the security and threatened to enforce the personal guarantees of the plaintiffs Directors.

Further that the proposed 2nd and 3rd Defendants in this suit are not the registered owners of plot No. Mombasa/Block/265 A and the issues relating to the validity or otherwise of the plaintiffs title to that property do not concern the proposed and and 3rd Defendants.

That the proposed 2nd and 3rd Defendants did not execute any personal guarantees in favour of the 1st Defendant to secure facilities granted by the 1st Defendant to the plaintiff and the enforcement of those guarantees by the 1st Defendant against the Directors of the Plaintiff do not concern the proposed 2nd and 3rd Defendants.

A perusal of the plaint in this suit filed on 9th July, 2012 shows that there are no orders sought by the plaintiff against the intended Defendants.

The subject matter of the suit is as regards a charge over plot No. Mombasa/Block/XX/265 'A' which belongs to the plaintiff.

The intended Defendants charged their plot No. Mombasa/Block XII/45. This property is the subject matter in Mombasa HCCC No. 2012 of 2011. (Mahendrakumar Chandulal Shah and Kirtibala Mahendrakumar Shah –Vs- Fidelity Bank Ltd, Keysian Auctioneers Aryan Ltd.

The Defendant in the present suit while exercising its statutory power of sale sold that property to the plaintiff in this suit.

A perusal of the intended Defendants amended plaint in Mombasa HCC No. 212 of 2011 shows that they have sought a decree against all the Defendants for fraudulent sale of property title No. Mombasa/Block XII/45.

It is therefore not clear why they now want to participate in this suit.

A further perusal of the defence filed in this suit shows that no counterclaim has been made and no orders are sought as and against the intended Defendants.

The question whether if they are enjoined in this suit they can file a defence is very apt. A defence to what? as they have not been sued and no orders have been sought against them.

I concur with Counsel for the Respondent that the intended Defendants have filed a suit against the Defendant and the plaintiff in HCC No. 212 of 2011 and hence they cannot file a counter claim in this suit.

I am of the considered view that if the intended Defendants are enjoined in this suit it will muddle up the issues and amount to duplication with HCC No. 212 of 2011.

The upshot is that I find that this application has no merit and it is dismissed with costs.

Ruling delivered dated and signed this **17th day February, 2014.**

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**M. MUYA**

**JUDGE**

**17TH FEBRUARY, 2014**

**In the presence of:-**

Learned Counsel for the applicants absent

Learned Counsel for the Respondent Miss Muya

Court clerk Musundi