REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Suit 2533 of 1997

LALCHAND SHAH…….....……..…1ST PLAINTIFF

RAMMBHABEN LALCHAND SHAH…….....….2ND PLAINTIFF

- VERSUS –

INVESTMENT & MORTGAGES BANK LIMITED……DEFENDANT

HARITH SHETH…….....…….INTENDED 2ND DEFENDANT

R U L I N G

This is an application made by the plaintiffs under the provisions of **Order I Rules 10 (2) and 13, Order VIA Rules 3, 5, 6, 7, and 8** of the **Civil Procedure Rules**. The plaintiffs have sought leave of this court to enjoin Harith Sheth, advocate *(hereinafter referred to as the proposed defendant)* as a defendant in the suit. The plaintiffs further sought leave of the court to amend their plaint in terms of the proposed amended plaint annexed to the supporting affidavit of Lalchand Fulchand Shah. The grounds in support of the application are stated on the face of the application. The plaintiffs assert that the addition of the proposed defendant as a party to the suit is necessary to enable the court effectually and completely adjudicate upon and settle all the questions involved in dispute. The plaintiffs stated that they had delayed in filing the application to enjoin the proposed defendant to the suit on account of failure by their previous counsel to carry out their instructions. The plaintiffs contended that the proposed amendments would assist the court in determining the real questions or issues in controversy.

The application is opposed. The proposed defendant swore a replying affidavit in opposition to the application. He also filed grounds in opposition to the plaintiff's application. He deponed that the basis upon which the plaintiffs were seeking to enjoin him to the suit was legally untenable. He deponed that he had witnessed the execution of the legal charge, the subject matter of the suit, as required by the law and in his professional capacity as an advocate of the High Court of Kenya. He deponed that he had complied with the provisions of **Section 69A** and **Section 100A** of the **Indian Transfer of Property Act, 1882** when he witnessed and explained to the chargors the requirements of the said sections before the chargors signed the instrument of charge. He deponed that the allegations made against him by the plaintiff amounted to criminal fraud yet the plaintiffs had not made any report to the police concerning his said alleged misconduct. He deponed that he could not be enjoined in the suit since the plaintiffs' intended suit as against him was overtaken by the provisions of the **Limitation of Action Act**. He swore that the application to enjoin him to the suit was an afterthought, misconceived and brought in bad faith. He urged the court to decline to exercise its discretion in favour of the applicant and as a consequence dismiss the application with costs.

The defendant filed grounds in opposition to the application. It contended that the plaintiffs had filed the application to preempt the defendant's application which had been filed and which sought to strike out the plaintiff's suit and have judgment entered in favour of the defendant as prayed in its counterclaim. It contended that the plaintiffs had failed to adduce any evidence in support of their allegation that the intended defendant had committed any fraud against them. The defendant was of the view that the amendments sought to be made introduced entirely a new cause of action which was not contemplated by the previous suit; and in any event, such claim could not be allowed to be introduced since the claim was barred by the **Limitation of Action Act**.

The advocates for the parties filed skeleton submissions before the date scheduled for the hearing of the application. At the hearing of the application, I heard the rival oral submissions made by Mr. Mutuli for the plaintiffs, Mr. Gichuhi for the defendant and Mr. Mwaniki for the proposed defendant. The three counsel basically reiterated the contents of the pleadings filed in support of their clients' respective cases and skeleton submissions filed in court. The issue for determination by this court is whether the plaintiffs have made a case to enable this court enjoin the proposed defendant as a party to suit and further grant leave to the plaintiffs to amend their plaint to reflect that reality.

Under **Order 1 Rule 10(2)** of the **Civil Procedure Rules** this court has discretion, either on application by a party to a suit or on its own motion, order the joining into the suit of any party or striking out a party who had been improperly joined to the suit. **Order VIA Rule 5 (1)** of the **Civil Procedure Rules** grants this court discretion to grant leave to any party to amend its pleadings for the purposes of determining the real questions in controversy. In **Central Kenya Limited vs. Trust Bank Limited [2002] 2EA 365** at page 369, the Court of Appeal held that:

"*As we stated earlier the learned trial judge took issue with the length of the proposed amendments. In his view they were too long. Mere length of proposed amendments is not a ground for declining leave to amend. The overriding consideration in applications for such leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise, mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond monetary compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot properly be compensated for in costs."*

At page 370 in the same judgment, the Court of Appeal, in considering the factors to be applied when determining whether a party should be enjoined to a suit pursuant to the provisions of **Order 1 Rule 10(2)** of the **Civil Procedure Rules**, had this to say:

"*The paramount consideration is whether the party concerned is necessary for the effectual and complete adjudication of all the questions involved in the suit."*

In the present application, the plaintiffs have sought the enjoining of the proposed defendant to the suit on the basis of comments made in a ruling in this suit by Mbaluto J and comments made in a ruling delivered by the Court of Appeal. In the said ruling, Mbaluto J advised the plaintiffs to enjoin the proposed defendant if they were serious with their allegation that the proposed defendant had made a false certificate on the mortgage instrument *(see page 3 of the ruling delivered on 18th February, 2000)*. The Court of Appeal commenting on the said allegations, stated at page 5 of its ruling as follows:

"*If the Shahs [the plaintiffs] were serious about what they say in regard to attestation they ought to have filed a declaratory suit to avoid the charge by making the Bank, the borrower and Mr. Sheth defendants to that suit. Alternatively they could have added Mr. Sheth and the Borrower as co-defendant in the suit they have filed. If Mr. Sheth acted wrongfully he would possibly face the consequences. I also note that no irregularity is alleged against the bank. None is pleaded or particularized." (Shah J.A's ruling).*

(See **Lalchand Fulchand Shah & Anor. Vs. Investment & Mortgages Bank Limited CA civil application No. Nai 165 of 2000 (73/2000 UR).)**. The learned Judge of Appeal noted that the credibility of the plaintiffs was doubtful when they made the allegations in question. The ruling by the Court of Appeal was delivered on 7th July, 2000.

The plaintiffs took no action until five (5) years later when on 4th March, 2005 they now sought to enjoin the proposed defendant as a party to the suit. The plaintiffs have conveniently ignored the advice by the Court of Appeal that they should also enjoin the borrower if they were serious in their allegation that the proposed defendant had acted unlawfully by attesting the mortgage instrument. It was argued on behalf of the plaintiffs that the proposed defendant is a necessary party to the suit on the basis of allegations made in the proposed amended plaint. The plaintiffs have however not sought any prayers against the proposed defendant. I agree with the submission made by the proposed defendant that it is unnecessary to enjoin him to the suit because the plaintiffs have no claim against him. In any event, if the plaintiffs desired to bring out in evidence the alleged misconduct by the proposed defendant, they would be free to summon the proposed defendant to attend court and offer testimony regarding the said allegations. I think the proposed defendant will be prejudiced if he is enjoined to the present proceedings where clearly he is not a necessary party. In any event, the plaintiffs would be hard pressed to establish their case against the proposed defendant in the absence of the borrower as a party to the suit.

Further, the application seeking to enjoin the proposed defendant as a party to the suit was made five (5) years after the plaintiffs were advised to make such an application. It was clear that the plaintiffs are guilty of laches. I agree with the defendant that the application was made by the plaintiffs to preempt the defendant's application which sought to strike out the plaintiffs' suit. The plaintiffs filed the present suit in a bid to stop the defendant from exercising its

statutory power of sale by disposing the plaintiffs' parcel of land known as LR 209/66/41 which had been mortgaged to the defendant. The plaintiffs failed in their attempt. The said parcel of land was sold after the Court of Appeal rendered a ruling in favour of the defendant. Having carefully considered the facts placed before this court, this court is of the view that the plaintiffs have failed to make a case for this court to allow them, firstly, to enjoin the proposed defendant to the suit, and secondly, to amend its plaint essentially to set out its proposed case against the proposed defendant.

The application lacks merit. It is hereby dismissed with costs to the defendant and the proposed defendants.

DATED at NAIROBI this 18th day of June 2008.

L. KIMARU

JUDGE