REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 728 of 2003

1. **SUDHIR K. SHAH**
2. **HARSHIDA S. SHAH**
3. **DEEPA S. SHAH**
4. **PARAG S. SHAH**
5. **VIJAYKUMAR K. SHAH**
6. **JAYOTIKA SHAH**
7. **MEERA V SHAH**
8. **NAMAN V SHAH**
9 **MANDEEP V. SHAH**
10. **KAMAL K. SHAH**
11. **KASHMINA K. SHAH**
12. **SAWAN K. SHAH**
13. **NIKITA K. SHAH**
14. **KANTABEN C, SHAH**
15. **RAKSHIT C. SHAH**
16. **DIPESH C. KARMAN**
17. **VANDANA C. SHAH**
18. **GANGABEN K. SHAH …….....…….PLAINTIFFS**

VERSUS

1. **SHEETAL KAPILA**
2 **ISHAN KAPILA**

3. LAMA LIMITED

4. PANACHAND J. SHAH

5. HANSRAJ F. GUDKA

6. ABDUL AZIZ LALANI

7. DIPAK P. SHAH

8. PANCHAND J. DEDHIA

9. ATUL H. GUDKA

10. RELIANCE BANK LIMITED (In Liquidation)

11. DEPOSIT PROTECTION FUND BOARD

(In its capacity as liquidator of 10th Defendant)

12. CENTRAL BANK OF KENYA…….....……DEFENDANTS

R U L I N G

This is an application by the 1st and 2nd Defendants, who are seeking to strike out the plaint, as against themselves.

It is the applicants' case that the cause of action, as pleaded in paragraphs 16, 17 and 18 of the Plaint,, is fraudulent conversion.

As fraudulent conversion is said to be a tort, the applicants point out that an action founded thereon ought to be lodged within 3 years of the cause of action accruing.

In this case, all the particulars of the alleged fraud, are said to have become known by the plaintiffs, by November 1998. Therefore, as the suit was filed on 14th November 2003, the applicants contend that the suit was barred by the provisions of Limitation of Actions Act.

It is the applicants' case that no amount of amendments could assist the plaintiffs to revive the plaint in any form.

The second limb of the application was that the plaint constituted an abuse of the process of the court. In support of that contention, the applicants first pointed out that the Bearer Certificates of Deposits, which are in issue in the case, had been discounted whilst they were still held by the plaintiffs.

However, as the law acknowledges the fact that a Bearer Certificate of Deposit could only be discounted upon delivery thereof, the applicants submitted that there could have not been any conversion (whether fraudulent or otherwise) of Bearer Certificates of Deposit, which at all times remained in the plaintiffs' custody.

In the said circumstances, the applicants contend that if the plaintiffs were allowed to prosecute the suit against them, that would be tantamount to allowing the plaintiffs an opportunity to give adverse publicity against the applicants, who were only but advocates who incorporated Lama Limited, the Third Defendant.

For those reasons, the applicants asked the court to order that the plaint against them be dismissed,

pursuant to the provisions of Section 4(2) of the Limitation of Actions Act, as read together with the provisions of the Bill of Exchange Act.

In responding to the application, the plaintiffs first conceded that they first learnt of the utilisation or conversion of the Bills of Exchange in November 1998. It was said that in that year 1998, the 10th Defendant was placed under receivership, after which it was liquidated.

At that same time, the Central Bank of Kenya did give notice to all persons who were bearers of Bearer Certificates of Deposit, which had been issued by Reliance Bank Limited and other specified banks. By the said notice, the bearers of the said certificates of deposit were required to wind them up within seven (7) months.

Notwithstanding the said notice from the Central Bank of Kenya, the plaintiffs insist they were compelled to undertake comprehensive investigations, which eventually disclosed the applicants' involvement in the alleged fraud.

The plaintiffs said that the applicants were the advocates for the 3rd to 9th Defendants, who were the shareholders as well as directors of the 10th Defendant.

The investigations are said to have revealed that the proceeds of the Bearer Certificates of Deposit had been credited to the account of the 3rd Defendant. But, according to the plaintiffs, there is no assertion in the plaint, about the date of the applicants' involvement in the alleged fraud. I suppose that the failure to specify any date is meant to imply that the date from which time ought to run as against the plaintiffs' claim against the applicants' is uncertain.

To my mind, whether or not the dates when the applicants are deemed to have been involved in fraud were uncertain, that would not alter the plaintiffs' assertion to the effect that the alleged fraud had taken place by November 1998. I say so because by that date, the plaintiffs had discovered the occurrence which later became the cause of action herein.

The plaintiffs also submitted that it is their case that the applicants fraudulently incorporated Lama Limited (the 3rd Defendant) and were directors thereof. The said 3rd Defendant is said to have been used to fraudulently convert the Bearer Certificates of Deposit.

As the applicants do not deny having incorporated the 3rd Defendant, as a limited liability company, and as the applicants do not also deny having been directors of that company, the plaintiffs' submitted that the applicants had abused their privileged position as advocates, in setting up the 3rd Defendant, which was then used as a vehicle for fraud.

From all those points, the plaintiffs submitted that the plaint raised no less than four triable issues, which should therefore entitle them to an unconditional leave to prosecute the suit against the applicants, amongst others.

When considering this application, I have had to also take into account the fact that the 7th Defendant had also filed an application to strike out the plaint. The said application was dated 8th March 2004, and it was heard and determined by the Hon. Emukule J.

In a ruling dated 15th September 2004, the learned judge did

note that the issues for his determination were as follows;

"1) **Does the suit disclose a reasonable cause of action?**

2) **Is there misjoinder of parties and cause of action?**

3) **Is the plaintiffs' Affidavit defective and should all the plaintiffs have sworn a Verifying Affidavit?**

4) **Is the suit an abuse of the process of the Court?"**

The first reason why I have had to take into consideration the decision of my learned brother is the fact that the plaintiffs submitted that applicants were estopped, as were all defendants, from litigating anew under the provisions of Order 6 rule 13 of the Civil Procedure Rules. Indeed, the plaintiffs' said that there arose res judicata, and issue estoppel against the application before me, due to the fact that all the issues canvassed in the present application had already been adjudicated upon by the Hon. Emukule J.

But the applicants believe that as they were not party to the application which was heard and determined by the Hon. Emukule J., they could not be accused or re-litigating.

In **TRADE BANK LIMITED V LZ ENGINEERING CONSTRUCTION LTD [2000] 1 E.A. 266 at 270,** the Court of Appeal held as follows;

"**Issue estoppel and res judicata bar the appellant from re-litigating matters already ruled on by the Court, since the point at issue in both appeals is the same and based on the same facts between the same parties and arose out of the same action, which point had been decided with certainty and it matters not whether the first decision was right or wrong."**

In that regard, I do agree with the applicants that they cannot be said to be re-litigating as suggested by the plaintiffs' herein, as they had not previously litigated on the issues now before the court. Therefore, issue estoppel or res judicata would not be a bar to the application before me.

The plaintiffs also made the point that the learned judge who determined the application of the 7th Defendant, had expressly limited himself to that application. Therefore, the applicants believe that that decision could not be in vain.

In his ruling, the Hon. Emukule J. said, at page 15 thereof;

"**I will only deal with these issues in relation to the cause of action against the 7th Defendant as a director and shareholder of the 10th Defendant (Reliance Bank Ltd – in liquidation) and whether or not the Plaint discloses a reasonable cause of action, including the issue of limitation."**

In effect, the learned judge did make it abundantly clear that his decision was only in relation to the application by the 7th defendant. In that regard, I believe that that is absolutely correct because it was only the application by the 7th defendant which was before the learned judge.

For that reason, the applicants argued that the ruling by the Hon. Emukule J. would not be useful to me, when I was considering the application now before the court. That contention was also partially founded on the applicants' belief that the Hon. Emukule J. may have erred when he suggested that Section 27 of the Limitation of Actions Act could possibly salvage a claim that would otherwise have been barred by limitation.

To my mind, whether or not that is what the learned judge did hold; and whether or not such holding was right or wrong, would be immaterial on the issue of issue estoppel or res judicata. I say so because of the express finding by the Court of Appeal in the case of **TRADE BANK LIMITED V LZ ENGINEERING CONSTRUCTION LIMITED** (above-citied).

I next ask myself what the effect was of the statement by the Hon. Emukule J., that his ruling would be limited to the application by the 7th Defendant. Did that mean that any findings of law and fact on the various issues before him could only apply to the 7th Defendant?

I believe that insofar as no other defendant was party to the application by the 7th Defendant, any decision arrived at by the court, on that application, could not automatically determine the rights or liabilities of such other defendants.

In "**Halsbury's Laws of England"** 4th Edition, Vol. 37, it is stated that the extensive powers with which the courts are invested, to strike out pleadings;

"**are both salutary and necessary not only to enforce the basic rules of pleadings but also to dispose of proceedings which are hopeless, baseless or without foundation in law or in equity or are otherwise an abuse of the process of court."**

The learned authors of that valuable text do emphasize that the summary procedure of striking out pleadings should only be applied to cases which are plain and obvious, where the case is clear beyond doubt. In their considered view, the mere fact that a case was weak or may not be likely to succeed at the trial, is no ground for striking out a pleading.

In this case, the plaintiffs say that they continue to hold the Bearer Certificates of Deposit. That would imply that the said Certificates had not been negotiated, pursuant to the provisions of Section 31(2) of the Bills of Exchange Act. That section stipulates that a bill payable to the bearer was negotiated on delivery.

Therefore, as the plaintiffs readily conceded that they were still holding on to the Bearer Certificates of Deposit, which were in issue in this suit, the applicants believe that the said certificates cannot have been converted.

Logically, the applicants are correct, because for as long as the certificates were still held by the plaintiffs, they cannot be said to have been converted. That would imply that the claim for fraudulent conversion would not have any chances of success, if the conversion is said to be in relation to the Bearer Certificates of Deposit.

However, in my understanding of the pleadings by the plaintiffs, there is a contention that there was fraud, because without the Bearer Certificates of Deposit, none of the defendants should have been able to negotiate the said certificates. Therefore, when they were discounted, in the absence of the original certificates, the plaintiffs assert that that was fraudulent.

In relation to the applicants, the case, as appears at paragraph 19 of the Plaint, is that they abused their privileged positions as Advocates of the High Court, to perpetuate the fraud. And at paragraph 21 of the plaint, it was alleged that the applicants herein were liable as beneficiaries of the fraudulent conversion.

Those are serious and important matters of law. By raising them, the plaintiffs have not been shown to have been motivated by any improper motive, such as has been suggested by the applicants.

In the case of **D.T. DOBIE & COMPANY (KENYA) LTD V MUCHINA [1982] KLR 1,** the Hon. Madan J.A. (as he then was) emphasized that when determining an application to strike out a case, for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court, "**the court ought not to deal with any merits of the case as that is a function solely reserved for the judge at the trial, as the court itself is not usually fully informed so as to deal with merits without discovery, without oral evidence tested by cross-examination in the ordinary way."**

For that reason, the learned judge did quote with approval, the following words of Lord Justice Swinfen Eady in **MOORE V LAWSON & ANOTHER [1915) 31 TLR 418 at 419;**

"**It is a jurisdiction which ought to be very sparingly exercised and only in exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable and one which it was difficult to believe could be proved."**

Could the 1st and 2nd defendants be liable to refund the proceeds of the Bearer Certificates of Deposit,

on the grounds of the alleged abuse of their privileged positions as advocates? Were they beneficiaries of the alleged fraudulent conversion? Are those two issues necessarily inter-connected?

All those, and more, are questions which I find would be best answered by the trial court. It is not for me to delve into the merits thereof.

For all those reasons, I decline to summarily strike out the plaint herein. However, I do order that the costs of the application dated 15th March 2005 shall be in the cause. I so order because I believe that it is the party who ultimately succeeds in the suit who should also get the costs of this application. Justice so demands.

Dated and Delivered at Nairobi, this 28th day of November 2006.

FRED A. OCHIENG

JUDGE