



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 2335 of 1997

MORTICHAND VIRPAL SHAH1ST PLAINTIFF

RAMJI VIRPAL SHAH2ND PLAINTIFF

DHARMESH KUMAR RAMJI VIRSHAH3RD PLAINTIFF

VERSUS

INVESTMENT & MORTGAGES BANK LTD.1ST DEFENDANT

SHAH MOTORS LTD (IN RECEIVERSHIP)2ND DEFENDANT

HARIT SHETH3RD DEFENDANT

R U L I N G

This is an application expressed to be brought under the provisions of Order 10 Rule 13 of the Civil Procedure Rules, the Evidence Act and the Inherent Powers of the Court for an order that the 1st defendant and the 3rd defendant do produce under oath before the next hearing date certain documents listed in the application. The application which is supported by the affidavits of the 3rd plaintiff and his counsel is based on three grounds as follows:

- (a) **THAT the 3rd plaintiff has served the 1st and 3rd defendants with a Notice to produce the said documents.**
- (b) **THAT the documents are in the possession or control of the 1st and 3rd defendants.**
- (c) **That it is in the interests of Justice that the 1st and 3rd defendants be compelled to produce the documents.**

The application is opposed and there are grounds of opposition filed by the advocates for the 1st and the 3rd defendants. The application was canvassed before me on 6.10.2006 and 11.10.2006 by M/s Singh learned counsel for the 3rd plaintiff and Mr. Kuria learned counsel for the 1st and 2nd plaintiffs, Mr. Gichuhi learned counsel for the 1st and 2nd defendants and Mr. Ngunjiri learned counsel for the 3rd defendant.

Having heard the rival submissions made on behalf of the plaintiffs and the defendants, I take the following view of this matter. This suit was filed by the plaintiffs on 18.9.1997 over 9 years ago. When the pre-trial proceedings were concluded the plaintiff's, opened their case on 26.4.2004. On that day the 3rd plaintiff testified but did not conclude his testimony until 18.6.2004. He was then represented by Dr. Kamau Kuria. On 10.3.2005 the plaintiffs rested their case.

On 18.7.2005 the 1st defendant's witness gave his testimony and all advocates then appearing agreed on bundles of documents which were then produced by consent. Dr. Kuria the then counsel for the plaintiffs cross examined the 1st defendant's witness at length concluding the cross examination on 6.12.2005. On that date, M/s Singh Gitau Advocates filed a Notice of Change of Advocates to act for the 3rd plaintiff in place of Dr. Kuria. The new counsel for the 3rd plaintiffs subsequently filed this application. I have given the above background to give perspective to the 3rd plaintiff's application. The defendants have vigorously opposed the application in my view with some justification. The 3rd plaintiff rested his case on 26.4.2004 and the entire case of the plaintiffs came to a close on 10.3.2005.

The 3rd plaintiff now seeks orders that should ideally have been sought before the trial commenced. I am alive to the fact that an application under Order X Rule 13 of the Civil Procedure Rules may be made at anytime during the pendency of the suit. The court no doubt has a wide discretion under that rule but the discretion is a judicial one and should not be exercised arbitrarily, whimsically or capriciously. The 3rd plaintiff served notices to produce documents for inspection upon the 1st and 3rd defendants under Order XII Rule 8 of the Civil Procedure Rules. The notices are annexed to the application. Order XII Rule 8 is however only limited to Notice to produce documents in court. Failure to comply with such a notice in my view may result in the party giving the notice relying on secondary evidence. Production of documents under that rule in my view is independent of production under Order X Rule 13 aforesaid. When documents are produced under the latter rule the court may deal with the same as it appears just. The order does not seem to have a penalty provision in the event of non-compliance. However, that is neither here nor there. The 3rd plaintiff has all along been ably represented by counsel. He has closed his case as already stated. The 1st defendant has commenced its case. Indeed I am informed its only witness has testified and does not wish to rely on any other documents. With respect to the 3rd defendant who is an advocate, the 3rd plaintiff desires that he produces particulars of all charges and securities documents attested by him to cover the 2nd defendant's loan and in particular LR No. 209/66/44 and LR No. 209/8571 Riverside. I don't see how an advocate who merely attests a party's signature can keep documents upon which such attestation has been done. In any event, I do not see how non-compliance with production will prejudice the 3rd plaintiff whose case is closed. The above findings notwithstanding this suit was filed way back in 1997. To allow this application will in effect give the 3rd plaintiff "Most favoured Nation" treatment with the result that the playing field will be tilted in his favour. The court cannot countenance such a result as in civil proceedings, indeed in all judicial proceedings, the playing field must remain level.

I have perused the cases and legal texts relied upon by counsel for the 3rd plaintiff. The principles enunciated therein are correct but the circumstances of this case as analysed above are clearly distinguishable and stand on their own.

I will in the premises dismiss the application with costs to the 1st and 3rd defendants.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF NOVEMBER 2006

F. AZANGALALA

JUDGE

Read in the presence of Chacha Holding brief for Dr. Kuria for the 1st and 2nd plaintiffs. Singh for the 3rd plaintiff, Gichuhi for the 1st and 2nd defendants and Kariuki holding brief for Ngunjiri for the 3rd defendant.

F AZANGALALA

JUDGE

17/11/2006