



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Misc Civ Appli 427 of 2000**

**CENTRAL BANK OF  
KENYA .....APPLICANT**

**VERSUS**

**KAMAL Z. SHAH.....1<sup>ST</sup> RESPONDENT**

**NORLAKE INVESTMENTS LTD .....2<sup>nd</sup>  
RESPONDENT**

**RULING**

This is an Application expressed to be brought under the provisions of Section 3A and 100 of the Civil Procedure Act, Order VIA Rules 5 and 8 of the Civil Procedure Rules and all enabling powers and provisions of the Law. The Applicant seeks leave to amend its Notice of Motion dated 30<sup>th</sup> April, 2004.

The application is sought on the grounds that:-

1. The proposed amendments are necessary to enable the Court to determine the real issues in controversy between the parties.
2. No prejudice shall be occasioned to the Respondents if the leave is granted.
3. The Respondents have threatened to levy execution;
4. The omissions sought to be rectified resulted from inadvertent oversight by Counsel for the Applicant which is excusable.

The Application is supported by an affidavit sworn by Bernard Koyyoko – Counsel for the Applicant.

The Application is opposed and the Respondents have filed Grounds of Opposition. The Application was canvassed before me on the 26<sup>th</sup> November, 2004 by Mr. Koyyoko Learned Counsel for the Applicant and Mr. Wasuna Learned Counsel for the Respondents.

Counsel for the Applicant relied on his affidavit in support of the Application and emphasized that the amendment sought is to cite the correct provisions of the rules under which the Application is made and to specifically pray for stay of execution instead of stay of proceedings.

In opposing the application, Counsel for Respondents submitted that the Applicant is guilty of inordinate delay in bringing this Application. He further argued that the proposed amendment will introduce a new

cause of action and is inconsistent with the cause pleaded in the Application sought to be amended. He added that if the leave sought is granted it will delay this matter as it will involve the filing of further affidavits with the result that the issues in dispute will be clouded. Finally Counsel submitted that costs will not adequately compensate the Respondents. In his view the Applicant should withdraw this Application and file a fresh one.

I have considered the Application, the Affidavit in support thereof, the Grounds of Opposition and the Submissions of Counsel. Having done so I take the following view of the matter. To grant or not to grant the leave sought is a matter of discretion. I have to decide whether or not in the circumstances of this case I should exercise my discretion in favour of the Applicant. The main objection to the leave sought in my view is that the proposed amendment seeks to introduce a new and inconsistent cause of action and further that if allowed will cloud the issues in dispute rather than crystallize them. The Applicant should therefore have withdrawn this Application and filed a fresh one.

I have perused the proposed amendment. I am not persuaded that the same introduces a new and inconsistent cause of action. The Applicant had originally sought stay of further proceedings including execution proceedings. I am not also persuaded that the proposed amendment will have the effect of clouding the issues in dispute. The proposed amendments are simple amendments and cannot confuse the Respondents who are ably represented by very experienced Counsels.

It is our Law that amendments may be allowed at any stage before judgment provided that the damages which may arise as a result of the amendment can be cured by way of costs. The main prejudice the Respondents will suffer is some delay in the conclusion of this matter. This *per se* is not sufficient to refuse leave to amend. It has also not been demonstrated to me that the delay in bringing this Application has caused the Respondents damage or injury which cannot be cured by an award of costs.

Rule 5(1) of Order VA Civil Procedure Rules is in the following terms:-

*“5(1) For the purpose of determining the real question in controversy between the parties, or 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.”*

The Respondents have not demonstrated that if leave to amend the Application in question is granted they will suffer any injustice or injury that cannot be compensated by costs. In the result, I allow the leave sought. The Applicants' Application dated 12<sup>th</sup> November, 2004 is therefore allowed in terms of prayer 2. The Respondents shall have the costs of this Application.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 10<sup>TH</sup> DAY OF DECEMBER 2004.**

**F. AZANGALALA**

**JUDGE**

**Read in the presence of:-**