



Case Number:	Civil Case 2335 of 1997
Date Delivered:	17 Nov 2006
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Commercial Courts Commercial and Tax Division)
Case Action:	-
Judge:	Festus Azangalala
Citation:	MORTICHAND VIRPAL SHAH & 2 others v INVESTMENT & MORTGAGES BANK LTD & 2 others [2006] eKLR
Advocates:	-
Case Summary:	-
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 2335 of 1997**

**MORTICHAND VIRPAL SHAH .....1<sup>ST</sup> PLAINTIFF**

**RAMJI VIRPAL SHAH .....2<sup>ND</sup> PLAINTIFF**

**DHARMESH KUMAR RAMJI VIRSHAH .....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**INVESTMENT & MORTGAGES BANK LTD. ....1<sup>ST</sup> DEFENDANT**

**SHAH MOTORS LTD (IN RECEIVERSHIP) .....2<sup>ND</sup> DEFENDANT**

**HARIT SHETH .....3<sup>RD</sup> 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 1<sup>st</sup> defendant and the 3<sup>rd</sup> 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 3<sup>rd</sup> plaintiff and his counsel is based on three grounds as follows:

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

The application is opposed and there are grounds of opposition filed by the advocates for the 1<sup>st</sup> and the 3<sup>rd</sup> defendants. The application was canvassed before me on 6.10.2006 and 11.10.2006 by M/s Singh learned counsel for the 3<sup>rd</sup> plaintiff and Mr. Kuria learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs, Mr. Gichuhi learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants and Mr. Ngunjiri learned counsel for the 3<sup>rd</sup> 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 3<sup>rd</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 3<sup>rd</sup> plaintiff in place of Dr. Kuria. The new counsel for the 3<sup>rd</sup> plaintiffs subsequently filed this application. I have given the above background to give perspective to the 3<sup>rd</sup> plaintiff's application. The defendants have vigorously opposed the application in my view with some justification. The 3<sup>rd</sup> plaintiff rested his case on 26.4.2004 and the entire case of the plaintiffs came to a close on 10.3.2005.

The 3<sup>rd</sup> 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 3<sup>rd</sup> plaintiff served notices to produce documents for inspection upon the 1<sup>st</sup> and 3<sup>rd</sup> 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 3<sup>rd</sup> plaintiff has all along been ably represented by counsel. He has closed his case as already stated. The 1<sup>st</sup> 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 3<sup>rd</sup> defendant who is an advocate, the 3<sup>rd</sup> plaintiff desires that he produces particulars of all charges and securities documents attested by him to cover the 2<sup>nd</sup> 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 3<sup>rd</sup> 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 3<sup>rd</sup> 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 3<sup>rd</sup> 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 1<sup>st</sup> and 3<sup>rd</sup> defendants.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF NOVEMBER 2006**

**F. AZANGALALA**

**JUDGE**

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

**F AZANGALALA**

**JUDGE**

**17/11/2006**



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