REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: GICHERU, KWACH & LAKHA, JJ.A.)
CIVIL APPEAL NO. 194 OF 1998
BETWEEN

NATHALAL MONJI RAI

SHANTABEN NATHALAL MONJI RAI

BIHARLAL NATHALAL RAI

JAGDISH NATHALAL RAI

DHARMENDRA NATHALAL RAI

INDUSTRIAL HARDWARE (KENYA) LTD.................. APPELLANTS

AND

STANDARD CHARTERED BANK KENYA LTD........... RESPONDENT

(Being an appeal from the ruling and order of the High Court

of Kenya at Nairobi (Mr Justice Kuloba) dated 1st July, 1998

in

H.C.C.C. NO. 577 OF 1997)
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JUDGMENT OF THE COURT

Standard Chartered Bank Kenya Limited, the respondent in this appeal (*hereinafter called Athe defendant @)* lent Industrial Hardware (Kenya) Limited, the sixth appellant (*hereinafter called Athe sixth plaintiff @)* Shs 16,200,000/= against the security of a legal charge over *Plot L.R. No. 209/942/1* Nairobi, *(hereinafter called Athe property @)* the personal guarantees of its directors, *Nathalal Rai, Shantaben Rai, Biharlal Rai, Jagdish Rai and Dharmendra Rai (hereinafter called t he Afirst, second, third, fourth and fifth plaintiffs @)*. The first and second plaintiffs are the registered owners of the property. An additional security was provided in the form of a debenture over the movable assets of the sixth plaintiff to the tune of Shs 12,500,000/=.

The sixth plaintiff defaulted and the defendant moved to realise its security by exercising its statutory power of sale. In order to stop the defendants from selling the property by public auction, all the six plaintiffs filed a suit in the superior court seeking, among other reliefs, a declaration that the right to exercise the statutory power of sale had not arisen and in the alternative that the defendant was acting oppressively, and a temporary injunction restraining the defendant from selling the property or enforcing

the guarantees.

On 10th March, 1997, the plaintiffs made an application under *Order 39 rules 1, 2 and 3 of the Civil Procedure Rules* for an interim injunction to restrain the defendant from selling the property pending the hearing of the suit. This application was not heard but on 22nd May, 1997 a consent order was recorded by Kuloba J in the following terms-

> ***ABy consent the plaintiffs shall pay the defendant Shs 17,000,000/= within 100 days from today, the balance of the sum claimed and disputed by the plaintiffs shall be settled after accounts taken, and if not agreed it shall be determined by the court; the sale scheduled for today is hereby stopped and suspended sine die; in default of payment of the said Shs 17 m or any part of it within the stated 100 days from today, then the defendant shall charge interest on the said sum of Shs 17m and the amount in dispute unless accounts will have been settled and agreed before the default shall become immediately due and r ecoverable by the defendant; the defendant to settle the advertisement and auctioneers charges and debited them on the sixth plaintiff =s account (sic). Liberty to either party to apply before this court. Costs in the cause.***

After this consent order was recorded, the plaintiffs did not comply with any of the agreed terms and made no payment. The plaintiffs resorted to the strategy of frustrating the defendant=s efforts to sell the property by filing frivolous applications for injunctions every time a sale was scheduled to take place. Then on 1st July, 1998 they revived the original application which had been dealt with in the consent order. Kuloba J heard it and dismissed it. Apparently the plaintiffs were now asking the learned Judge to set aside the consent order. The plaintiffs have now appealed against the Judge=s refusal to set it aside.

In asking the learned Judge to set aside the consent order counsel for the plaintiffs submitted that this could be validly done under the *liberty to apply* clause in the order. We do not agree. It would have taken little effort for Mr Kowade to discover that the Court of Appeal in England in the case of *Cristel v Cristel* [1951] 2 All ER 574 held that prima facie, the words, liberty to apply in an order meant that when the order was drawn up its working out might involve matters on which it might be necessary to obtain a decision of the court; they did not confer any right to ask the court to vary the order. That is the correct position in law and the *liberty to apply* clause in the consent order did not entitle the plaintiffs to apply to set aside or vary the consent order.

The other reason why the plaintiffs= application was bound to fail is because all they were trying to do was to restrain a mortgagee from exercising its statutory power of sale in a case where default and indebtedness were not denied and the necessary notices had been served. There was clearly no legal basis for any injunction - see ***Halsbury =s Laws of England*** , Volume *32 (4th Edition) paragr aph 725* , for the circumstances in which a mortgagee may be restrained from exercising its statutory power of sale.

For these reasons we are firmly of the opinion that there is no substance in this appeal and it is hereby dismissed with costs to the defendant.

Dated and delivered at Nairobi this 26th day of March, 1999.

J. E. GICHERU

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JUDGE OF APPEAL

R. O. KWACH

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JUDGE OF APPEAL

A. A. LAKHA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR