



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GICHERU, TUNOI & PALL, J.J.A.)

CIVIL APPEAL NO 59 OF 1993

BETWEEN

OMEGA ENTERPRISES (KENYA) LIMITED.....APPELLANT

AND

KENYA TOURIST DEVELOPMENT CORPORATION.....1ST RESPONDENT

KENYA NATIONAL CAPITAL CORPORATION LIMITED.....2ND RESPONDENT

ANDREW DAVID GREGORY.....3RD RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Nairobi (Akiwumi, J.) dated 15th January, 1993

in

H.C.C.C NO. 6776 OF 1992)

JUDGMENT OF GICHERU, J.A.

The facts giving rise to this appeal are fully stated in the judgment of Pall, J.A. the details of which I will not revert to save where necessary for the purpose of this judgment.

ELDORET SIRIKWA HOTEL LIMITED situated on LAND TITLE NUMBER L.R. ELDORET MUNICIPALITY/BLOCK 4/69 measuring approximately 1.5 hectares which latter together with the improvements thereon were charged in favour of the second respondent herein in consideration of some financial advances not exceeding K.Shs. 7,000,000/- and was in receivership on behalf of the National Bank of Kenya Limited, the Hotel's debenture holder to secure a sum of Kshs. 1,500,000/- advanced to it by the said bank, was on the morning of 18th December, 1992 at about 10.00 a.m. due for sale at a public auction on the instructions of the second and third respondents, the Chargee and Receiver/Manager respectively of ELDORET SIRIKWA HOTEL LIMITED. The latter was indebted to the first respondent in an unsecured sum of K.Shs. 80,000,000/- so that on the same morning of 18th December, 1992 the first respondent filed suit No. 6776 of 1992 in the superior court seeking inter alia an injunction to restrain the second and third respondents by themselves, their servants or agents or otherwise howsoever from selling all the property known as L.R. ELDORET MUNICIPALITY/BLOCK 4/69 together with the hotel

erected thereon and known as ELDORET SIRIKWA HOTEL LIMITED. Simultaneously with the filing of this suit, the first respondent also took out a Chamber Summons under Order XXXIX rules 1 and 9 of the Civil Procedure Rules, hereinafter referred to as the Rules, whose first and second prayers read as follows:

- “1. THAT service of this application be dispensed with and the application in the first instance be heard ex parte.
2. THAT a temporary injunction order be granted initially for 14 days restraining the defendants by themselves, their servants or agents or otherwise howsoever from selling ALL THAT property known as L.R. Eldoret Municipality/Block 4/69 together with the improvements thereon under the name of Eldoret Sirikwa Hotel, pending the inter partes hearing of the present application.”

The superior court record of 18th December, 1992 reads as follows:

“18/12/1992

CORAM: AKIWUMI, J.

Oyatsi for the applicant.

Order: The 2nd prayer of the C/S of the 18/12/1992 is hereby granted until 4/1/93 when the case will be heard inter partes. Respondents to be served. Costs in the cause. Photocopy may be served.”

Whether or not this order was served on the second and third respondents before the sale of L.R. ELDORET MUNICIPALITY/BLOCK 4/69 together with the Hotel erected thereon and known as ELDORET SIRIKWA HOTEL LIMITED is yet to be resolved. Nonetheless, the sale of the said property did take place as scheduled and the highest bid of K.Shs. 31,000,000/- at that sale was by the appellant which become the purchaser of the same.

Inter partes hearing of the first respondent’s Chamber Summons was on 11th January, 1993 and in his ruling dated and delivered on 15th January, 1993, Akiwumi, J., as he then was, held that the public auction of the property above mentioned on 18th December, 1992 was illegal, invalid and of no effect. He then confirmed the ex parte injunction order granted to the first respondent on the aforesaid date which was to continue to be in force until the determination of the substantive suit. It is from the order arising from this holding that the appellant now appeals to this Court.

At the commencement of the hearing of this appeal on 4th November, 1998, counsel for the first respondent, Mr. Oyatsi, sought the leave of the Court not to participate in this appeal as, according to him, the matters in issue herein concerned the appellant, the second and third respondents. He was granted his request.

In its amended memorandum of appeal, the appellant has listed 23 grounds of appeal. While addressing this Court, counsel for the appellant, Mr. Gautama, submitted that ground 6 of the appellant’s appeal was pivotal to this appeal and upon it turned its success or otherwise. Without, according to him, abandoning the appellant’s other grounds of appeal, he urged this ground only. That ground of appeal is in the following terms:

‘6. The learned Judge failed to appreciate that the ex parte order which he made on 18th December, 1992 having been made in defiance of the mandatory requirements of Order 39 rule 3 (1) of the Civil Procedure Rules was “invalid, had no legal basis and was therefore of no legal effect.”’

Mr. Gautama therefore submitted that when the subject matter of this appeal came before the superior

court on 18th December, 1992 the ex parte order made by the superior court on that day was without anyone saying anything and was in breach of Order XXXIX rule 3 (1) of the Rules. In not complying with the aforesaid rule, the superior court order dated 18th December, 1992 was invalid. Indeed, according to him, the first respondent's Chamber Summons of the even date made no mention of the nature of the urgency necessitating the granting of an ex parte injunction. There was therefore a breach of procedure and for this reason, subsequent proceedings flowing therefrom were a nullity. In any event, according to Mr. Gautama, whereas such an order whether regular or irregular may have bound the parties to the litigation before the superior court, anyone not a party to such litigation could not have been bound by it. The order of the superior court dated 15th January, 1993 flowing from the ex parte order of 18th December, 1992 had therefore no application to the appellant as the latter was not at any stage of the proceedings in the superior court, a party to those proceedings.

Counsel for the second and third respondents, Mr. Le Pelley, was, however, of the view that an order of the superior court unless set aside remains as such and until then it must be complied with. At any rate, according to Mr. Le Pelley, the provisions of Order XXXIX rule 3(1) of the Rules are directory rather than being mandatory and the failure of the superior court to comply with those provisions in the instant appeal did not take away its jurisdiction to grant an ex parte injunction order. Indeed the failure of that court to record the reasons for delaying with an application ex parte in terms of Order XXXIX rule 3 (1) of the Rules is an undue technicality for that failure may very well have been an oversight which should not be used as authority to ignore an ex parte order of a superior court legitimately made and which can only be challenged by an application to set it aside. To hold otherwise would be a recipe for disorder, counsel concluded.

Order XXXIX rule 3 (1) of the Rules is in the following terms:

“3. (1) Where the court is satisfied for reasons to be recorded that the object of granting the injunction would be defeated by delay, it may hear the application ex parte”

Clearly, from the foregoing provisions, the hearing of an application for injunction ex parte can only be legitimate where the court is satisfied that the object of granting the injunction would be defeated by delay and that satisfaction must be manifested by the recorded reasons of the court. Generally, an injunction will be granted ex parte only in cases of emergency or in cases of urgency and there is no way of knowing of the existence of any of these two factors unless the same is apparent on the record of the court. A matter may be one of urgency either because the matter is too urgent to await a hearing notice for instance where the property is in danger of being lost or destroyed or because the very fact of giving notice may precipitate the action which the application is designed to present – See **London and Country Banking Co. v. Lewis, (1882) 21 CH. D. 490; Fenwick V. East London Railway, (1875) L.R. 20 Eq. 544 at 547 and Brink's – Mat v. Elcombe [1988] 3 All E.R. 188 at 193.** Hence the need to show that there are strong grounds to justify the application being made ex parte. Indeed, where proceedings are taken by a plaintiff in the absence of the defendant, it is most important that there should be at every stage of the proceedings a strict compliance with the rules. This was not so, as is apparent from the record of the superior court in the instant appeal, at the ex parte stage of the proceedings taken by the first respondent as that court did not comply with Order XXXIX rule 3 (1) of the Rules. But let me quote a passage in the judgment of Romer, L.J. in **Hadkinson v Hadkinson, [1952] 2 All E.R. 567 at 569** which was quoted with approval by the House of Lords in the judgment of **Lord Diplock in Isaacs v. Robertson, [1984] 3 All E.R. 140 at 142:**

‘It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. **LORD COTTENHAM, L.C.**, said in **Chuck v. Cremer (1846) 1 Coop temp Cott 338 at 342, 47 ER 884 at 885** : “A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it.....It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the Court and not take upon themselves to determine such a

question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the Court that it might be discharged. As long as it existed it must not be disobeyed.” Such being the nature of this obligation, two consequences will, in general, follow from its breach. The first is that anyone who disobeys an order of the court.....is in contempt and may be punished by committal or attachment or otherwise.’

In the same case at page 143 of the same report Lord Diplock went on to say:

“there is a category of orders of such a court which a person affected by the order is entitled to apply to have set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and give to the judge a discretion as to the order he will make. The judges in the cases that have drawn the distinction between the two types of orders have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring an order into the category that attracts *ex debito justitiae* the right to have it set aside, save that specifically it includes orders that have been obtained in breach of rules of natural justice.”

In the instant appeal, the appellant was never a party to the first respondent’s suit against the second and third respondents in which the *ex parte* order of 18th December, 1992 was made by the superior court quite clearly in defiance of Order XXXIX rule 3(1) of the Rules. Subsequent *inter partes* hearing on 11th January, 1993 of the first respondent’s Chamber Summons referred to earlier in this judgment was without any reference to the appellant whose interests after 18th December, 1992 would be affected by the first respondent’s litigation against the second and third respondents. Hence, the order of the superior court dated 15th January, 1993 that the public auction of the property known as L.R. ELDORET MUNICIPALITY/BLOCK 4/69 together with the improvements thereon including the business carried thereon under the name of ELDORET SIRIKWA HOTEL LIMITED was illegal, invalid and of no effect and the confirmation of the certainly irregular *ex parte* injunction order of 18th December, 1992 which was to continue until the determination of the substantive suit was, as it affected the interests of and without the appellant being given an opportunity to be heard, clearly in breach of the rules of natural justice and attracts ***ex debito justitiae*** the right to have it set aside. In the result, I would allow the appellant’s appeal, set aside the order of the superior court dated 15th January, 1993 and order that the costs of this appeal be awarded to the appellant against the first, second and third respondents. As Tunoi and Pall, J.J.A. agree it is so ordered.

Dated and delivered at Nairobi this 11th day of December, 1998.

J.E. GICHERU

JUDGE OF APPEAL

JUDGMENT OF TUNOI, J.A

There is no need for me to re-state the facts leading to this appeal, which are sufficiently stated in the judgments of Gicheru and Pall, J.J.A with which I entirely agree.

At the commencement of the hearing of this appeal, Mr. Gautama, counsel for the appellant, informed the court that he would first address the court on ground 6 of the amended memorandum of appeal which is based on the premise that the *ex-parte* injunction granted by the learned Judge of the superior court (Akiwumi, J. as he then was) was null and void and hence every subsequent act and event founded on such nullity was equally a nullity. He submitted that the *ex-parte* order which was made on 18th December, 1992 did not comply with the mandatory requirements of order 39 rule 3 of the Civil Procedure Rules relating to issue of interim injunctions in that it does not contain the learned Judge’s reasons for his being satisfied that the object of granting the injunction would be defeated by delay. Further, he argued that the Court cannot grant an interim injunction for a period longer than 14 days and

yet the learned Judge in this instance had issued the injunction till 4th January, 1993 which was for a period of 17 days.

Mr. Gautama placed much reliance on the speech of the learned Judge (Akiwumi, J.A.) in Civil appeal No. 126 of 1995 (Uhuru Highway Development Ltd v Central Bank of Kenya and others) at page 17 of the transcript (lines 11 to 17) where he said:

“To my mind, the recording of the reasons by the learned Judge why he should hear the application ex-parte, is mandatory and the learned Judge, having failed to record his reasons as required by O.39 r 3 (1) could not, and should not, have gone on to hear the application ex-parte and to grant a temporary injunction. This order was invalid, had no legal basis and is therefore of no legal effect.....”

I would have dismissed the appeal as I had indicated earlier in this judgment, on the grounds that the ex-parte order was without any legal basis and null and void.....”

Mr. Gautama also referred to that part of my judgment in which I fully agreed with the judgment of Akiwumi, J.A. when I said:-

“Though the Court had jurisdiction to grant an ex-parte interim injunction even though it is ultimately discovered that the application may not be meritorious such grant is mandated by Order 39 rule 3 (1) to be based on reasons to be recorded by the Judge otherwise the object of granting the relief of injunction would be defeated. It is doubtful whether the ruling made by Githinji, J. did incorporate any recorded reasons at all.”

Order 39 rule 3 (2) is in the following terms:

“No injunctions may be granted ex-parte for longer than is shown to be necessary and in the case shall it be for more than 14 days.”

Thus, the ex-parte order made by the learned Judge was made without jurisdiction since the maximum period for the validity of the interim order of 14 days was exceeded. I think, also, that the said order must be without any legal basis and hence null and void.

Mr. Gautama again averred that no one, especially third parties, can be guilty of disobeying an order which is null and void. With this submission I agree. There cannot be as far as third parties are concerned interference with due administration of justice when the ex-parte order made is without any legal basis and is of no legal effect, and; as regards the parties to this suit, it cannot be said that there was disobedience of an order which was in the first place null and void.

In *Macfoy vs. United Africa Co. Ltd* [1961] 3 All E.R. 1169 Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

In Civil Application No. Nai. 56 of 1994 – Campbell v. Canadian Hunger Foundation, which application concerned granting a stay of execution pending the hearing of an appeal, this court said:

“Mr. Rebelo further drew our attention of the lack of endorsement of the notice of penal consequence on the order and submitted that it will be contended on behalf of the applicants that the orders granted by the Shields, J. were made on an application that was a nullity in Law. Indeed, if there was non-compliance with this elementary but, mandatory procedural rule the

entire contempt proceedings would be a nullity.”

It follows, therefore, in my judgment that all the proceedings before the learned Judge which were based upon the null and void order having been allegedly disobeyed are a complete nullity since with such a faulty foundation the entire house of cards must collapse without much ado.

Mr. Le Pelley, counsel for the 2nd and 3rd respondents, filed notice of grounds for affirming the decision of the learned Judge. Though the appellant objected to the notice this court ordered that the grounds were properly before the court and should be adjudicated upon. However, at the hearing of the appeal Mr. Le Pelley did not address us on the notice nor did he indicate to us that he was relying on the notice. In the circumstances the notice must be rejected.

For the above reasons I would allow the appeal with costs.

Dated and delivered at Nairobi this 11th day of December, 1998.

P.K. TUNOI

JUDGE KOF APPEAL

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

JUDGMENT OF PALL J.A.

This is an appeal by Omega Enterprises (Kenya) Ltd. (Omega from the ruling and Order of the High Court (Akiwumi J.) as he then was, delivered on 15th January, 1992. The facts giving rise to this litigation are that Kenya Tourist Development Corporation (K.T.D.C.) advanced an unsecured loan to Eldoret Sirikwa Hotel Limited (the Hotel) which on 18th December, 1992 according to K.T.D.C stood at a sum of Shs. 80,000,000/=. The Hotel is also indebted to Kenya National Capital Corporation Ltd (Capital) as alleged by K.T.D.C in the sum of Shs. 7 million, but as claimed by Capital in the sum of 21 million. The Hotel is also indebted to National Bank of Kenya Ltd (the Bank) in the sum of Shs. 1.5 million. Both loans of Capital and the Bank are secured by a debenture over the assets of the Hotel and a charge over its real property known as Eldoret Municipality Block 4/69 (the suit property). Capital is a subsidiary of the Bank. In the exercise of its powers contained as debenture holder, the Bank appointed on 28.7.1992, Andrew David Gregory (the receiver) the 3rd respondent as receiver manager of the Hotel. Soon after his appointment the receiver invited offers for the purchase of the Hotel by private treaty. Omega alleges that it gave an offer of Shs. 36 million which offer being the highest offer was accepted by the receiver, on 29.10.1992. Omega placed a deposit of shs. 3.6 million with the receiver but before a concluded agreement could be entered into, the receiver was advised that the suit property could not be sold otherwise than by public auction. While the deposit was still with the receiver, he decided to sell the property by public auction.

So, on the instructions of the receiver, the Hotel was scheduled to be sold by public auction on 18.12.1992 at 10.00 a.m. In the morning on the same day, K.T.D.C. as an unsecured creditor of the Hotel sued Capital and the receiver seeking to restrain them from selling the assets of the Hotel and the suit property by way of a permanent injunction and damages. Pertinent paragraphs of its plaint read as follows:-

7. The Plaintiff states that by an agreement reached between the various lenders of the said company including the defendants, it was agreed that upon the appointment of the Receiver/Manager, a proper valuation of the assets of the debtor company would be carried out and distributed to the lenders so that a decision would then be made on how to dispose of the assets of the debtor company at the best market value for the benefits of the debtor and all the lenders.

8. In breach of the said agreement, the defendants have resorted to the forced sale of the defendant's said property without obtaining the latest valuation thereof or distributing the same to the plaintiff for discussions as agreed.
9. The plaintiff states that a forced sale of the said property without proper valuation thereof or without agreement on the reserve price by the debtors lenders is a breach of the said agreement.
10. The plaintiff further states that the defendants have a legal obligation to the debtor company and the plaintiff as a leading lender not to act carelessly or recklessly in the exercise of their rights under the charge and debenture respectively.
11. The defendants will be acting carelessly and recklessly if they proceed with the forced sale of the said property without proper valuation and at the present time when they know or ought to know that the market prices are very low due to the prevailing economic circumstances in the country".

Along with the Plaint, K.T.D.C applied by an ex parte chamber summons under Order XXXIX rules 1 & 9 of the Civil Procedure Rules (the Rules) and by its second prayer prayed for a temporary injunction initially for 14 days restraining Capital and the receiver their servants and agents from selling the suit property with improvements thereon pending inter-parte hearing of that application.

Nyaringo Obure deputy director of K.T.D.C by his supporting affidavit conceded that the Bank had a debenture over the assets of the Hotel and Capital had a first charge on the suit property. He also conceded that the Bank in the exercise of powers conferred on it under the debenture had appointed the receiver who had advertised sale of the suit property by public auction for 18.12.1992. He annexed to his affidavit a copy of the said advertisement published by Daily Nation on 11.12.1992. He also annexed to his affidavit a copy of a letter dated 22.11.1992 written by the Executive Director of Parastatal Reform Programme in support of his allegation that prior to the appointment of the receiver consultations or discussions were held among various creditors of the Hotel, and it was agreed that "in order to obtain the best possible price available by the sale of the property. It would be necessary to have an assessment and valuation of the assets of the company before determining whether to sell the property by public auction or by private treaty". My prima facie view is, of course without pre-empting the issue whether or not there was an agreement as such which could have give K.T.D.C. as an unsecured creditor a cause of action against the Bank and Capital, that the letter is merely a suggestion which does not refer to any consultations or discussions among the various creditors of the Hotel. It does not seem to create any binding obligation on Capital or the Bank or the receiver. However, as the suit is pending, the issue is still open.

On the said 18.12.1992, when the said ex parte application came on for hearing before Akiwumi J. (as he then was), Mr. Oyatsi appealed for K.T.D.C. and the learned Judge granted the following order:-

"The 2nd prayer of Chamber Summons of 18.12.1992 is hereby granted until 4.1.1993 when the case will be heard inter-partes. Respondent to be served. Costs in the cause. Photocopy may be served."

By the 2nd prayer in question, as I have already said, K.T.D.C. sought the said order to restrain Capital and the receiver their servants and agents from selling the suit property including the hotel business carried thereon pending interparte hearing of the Chamber Summons of 18.12.1992. On 18.12.1992, the suit property was declared sold to Omega as the highest bidder, for Shs. 31 million. Omega says that it did not have to place a deposit as a deposit of Shs. 3.6 million was already with the receiver which had been previously paid to him by it in respect of the said aborted sale by private treaty.

It is, at least, in dispute whether or not the receiver or the auctioneer had been served with the aforesaid court order, before the fall of the hammer on 18.12.1992. According to the receiver, who was present at the auction, the hammer had fallen at about 10.30 a.m. and the contract of sale was signed at 10.40 and that no one came into the auction to serve the court order until after the agreement had been signed. On the other hand, there is an affidavit of Timothy Njuguna the investment manager of K.T.D.C. He has

deponed that m/s Shapley Barret & Co. Advocates had informed the auctioneer and every bidder of the injunction order. He went on to state that soon after the sale and before any payment of the deposit was made by the purchaser, the auctioneer was served with the injunction order. The sale price, he said, was far below the reserve price. Mohammed Yunis Sroya employed by m/s Shapley Barret & Co. as a Senior law clerk, by his affidavit sworn on 8th January, 1993 deponed that at about 9.10 a.m. he informed the auctioneer and the receiver that an application under a certificate of urgency for an ex parte injunction to stop the sale had been filled and that at about 10.00 a.m. he again spoke with the auctioneer and the receiver telling them that the order had been granted and arrangements were being made to serve the order upon them. He has further deponed that the receiver informed him that he would await service of the order and that the order was served upon them at 10.50 a.m. So it is difficult to say, in my view, whether the receiver and the auctioneer or either of them was in contempt of the order if it was served after the fall of the hammer. However that issue is not crucial for the purpose of my judgment.

The said application of 18th December, 1992 came for interparte hearing on 11th January, 1993 before Akiwumi J. (as he then was), in the presence of Mr. Oyatsi for K.T.D.C. and Mr. Le Pelley for Capital and the receiver. Mr Oyatsi simply asked the court to grant injunction pending hearing of the suit and submitted that a seller had to ensure that fair price was obtained and that the price was not fair. Mr. Le Pelley opposed the grant of injunction as he submitted, K.T.D.C had not suffered irreparably. He also submitted that the balance of convenience was not in favour of the injunction being granted. He further submitted that any one injured by wrongful sale shall have remedy only by way of damages under s.72 (1) of Registered Land Act. He also submitted that it was the Hotel only which had the right of redemption when the suit property was sold at the auction sale. He further submitted that the auctioneer found the injunction order only after the auction. In reply Mr. Oyatsi submitted that on balance of convenience, injunction should be granted as capital and the Bank had securities in their favour and were not going to suffer any loss.

The learned Judge by his ruling delivered on 15th January, 1993 which is the subject matter of this appeal held:

“The only orders that commend themselves to me and having regard to my inherent powers under S.3A of the Civil Procedure Act are that the purported public auction of the Hotel on 18th December, 1992 is illegal invalid and of no effect and the injunction granted on that day is hereby confirmed and shall continue in force until the determination of the substantive suit.”

Omega appeals from this order.

Its amended Memorandum of Appeal contains twenty-three grounds of appeal but at the hearing of the appeal Mr. Gautama for Omega submitted that without abandoning the other grounds he would address the Court only on ground No. 6 of the memorandum appeal which reads:-

“6. the learned Judge failed to appreciate that the ex parte order which he made on 18th December, 1992 having been made in defiance of the mandatory requirements of O.39 r 3(1) of the Civil Procedure Rules was invalid had no legal basis and was therefore of no legal effect.”

Order 39 r 3 reads (Paramateria):-

“3(1) Where the court is satisfied for reasons to be recorded that the object of granting the injunction would be defeated by delay, it may hear the application ex parte.

3(2) No injunction may be granted ex parte for longer that shown to be necessary and in no case shall it be for more than 14 days.”

3(3) In all other cases notice of application shall be given to the opposite party.”

Mr. Gautama submitted that the ex parte order which Akiwumi J made on 18th December, 1992 did not

comply with the mandatory requirement of O.39 r. 3 relating to interim injunction. The order, he submitted, does not contain the learned Judge's reasons for hearing the application *ex parte*. He submitted that law is that a Judge may hear an application for injunction, *ex parte*, only if he records his reason for so doing.

In all other cases, he submitted, notice of application must be given to the opposite side. Secondly he submitted that no injunction could have been granted *ex parte* for more than 14 days. In this case, he submitted, the *ex parte* injunction was granted for 16 days in defiance of O.39 r 3 (2) of the Civil Procedure Rules. Mr. Gautama went on to submit that there was no evidence of an agreement and as such K.T.D.C had no cause of action against Capital or the receiver. He finally submitted that an unsecured creditor could not restrain a charge once the power of sale had arisen to him. He finally submitted that as the order of 18th December, 1992 was null and void, for that reason, he argued, the order appealed from is also null and void.

Mr. Oyatsi who obtained the order appealed from in the superior court applied before us to be excused from participating in the appeal on behalf of the K.T.D.C and he did not participate in the appeal. But Mr. Le Pelley who in fact opposed the grant of the injunction order in the superior court, now supports the order and opposes this appeal which is obviously an inconsistent stand.

He has submitted that an order made by a court of unlimited jurisdiction even if it is null and void is binding unless it is set aside. It must be, he said, set aside by the Court. He went on to submit that even if the order of 18th December, 1992 had been improperly granted, it cannot be void because the provisions of O.39 r 3(1), were only directory and not mandatory. He relied on BOYLES VS GATHURE 1969 E.A. 385 in which an incorrect form of application for extending the life of a caveat under s. 57 of the Registration of Titles Act, namely a chamber summons instead of an originating summons, was used. Court of Appeal for Eastern Africa held that the use of wrong procedure did not invalidate the proceedings because (a) it did not go to the jurisdiction of the court and (b) it did not cause any prejudice to the appellant. Here, however it is not an incorrect use of the form of application but fundamental breach of a mandatory rule.

He also relied on ISAACS VS ROBERTSON (1984) 3 ALL E.R. 140 in which it was held that the orders made by a court of unlimited jurisdiction in the course of contentious litigation are either regular or irregular and that there are no orders which are void *ipso facto* without the need for proceedings to set them aside. They cannot be ignored with impunity by those persons to whom they are addressed. But, in my view, it follows that those to whom the order is not addressed are not bound to set it aside.

Lord Diplock at p.143 letter (e) also said:-

“The Judges in cases that have drawn distinction between the two types of orders have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring an order into the category that attracts *ex debito justitiae* the right to have it set aside, save that specifically it includes orders that have been obtained in breach of rules of natural justice.”

The order of 18th December, 1992 was addressed to Capital and the Bank who were in the superior court and are now before us represented by Mr. Le Pelley. They were the ones who were restrained from selling the suit property. They were the persons who were obliged to obey the order. They could have applied for the order to be set aside *ex debito justitiae* under inherent powers of the court as the order had been made in their absence and in breach of the rules of natural justice. If they chose not to do so, they cannot now take advantage of their own inaction.

I agree with Mr. Gautama that on 18.12.1992, Mr. Oyatsi did not address the court at all. Also the learned Judge did not record any reasons why he decided that the application should be heard *ex parte*. In his affidavit in support of the application. Obure does not say as to when it came to the notice of K.T.D.C. that the receiver had instructed an auctioneer to sell the suit property by public auction. He does not explain as to why the said application could not be lodged earlier and well in time so as to serve notice of

the application on the opposite side. There is no explanation as to why the application was brought on the very day of the sale hardly an hour before the sale was scheduled to take place. It is a mandatory requirement of the rule that unless the court is satisfied for reasons to be recorded that the application should not be heard *ex parte*, notice of the application must be given to the opposite party before it can be heard. Court of Appeal for Eastern Africa said in Noormohamed Janmohamed vs Kassamali Virji Madhani (1953) 20 EACA “the onus of proving good cause for dispensing with notice of an application for temporary injunction rested upon the applicant.”

In Uhuru Highway Development Ltd vs. Central Bank of Kenya and 2 others Civil Appeal NO 126 of 1995 none other than the Hon. Akiwumi J.A. said:

“To my mind the recording of reasons by the learned Judge why he should hear the application *ex parte* is mandatory and the learned Judge having failed to record his reasons as required by O.39 r 3 (1) could not and should not have gone on to hear the application *ex parte* and to grant the temporary injunction. This order was invalid, had no legal basis and therefore of no legal effect.”

In the same judgment in the concluding paragraph Akiwumi J.A. said that:

“The *ex parte* order was without any legal basis and null and void.”

In the same appeal Tunoi J.A. said:

“Although the court had jurisdiction to grant *ex parte* interim injunction even though it is ultimately discovered that the application may not be meritorious. Such grant is mandated by O.39 r 3(1) to be based on reasons to be recorded.....”

Also Order 39 rule 3(2) mandates that no *ex parte* injunction in any case shall be for more than 14 days. I agree with Mr. Gautama that the learned Judge granted the said *ex parte* injunction for 16 days clearly in defiance of the mandatory provisions of this subrule. I agree with Mr. Gautama that an order granted in defiance of order 39 rule 3 is invalid, and null and void. It cannot have any legal effect.

In MACFOY VS UNITED AFRICA LTD (1961) 3 All F.R. 1169 Lord Denning said at p. 1172:

“If an Act is void, then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad. There is no need for an order of the court to set it up aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

As the proceedings of 15th January, 1993 were in pursuance of the order of 18th December, 1992, they were also of no legal effect and a nullity in law. It is immaterial for the purposes of this appeal whether or not the order of 18th December, 1992 had been set aside. In any event it was not addressed to Omega. Also there is no doubt that the learned Judge could not have declared the sale of the suit property illegal or void without first giving Omega an opportunity of being heard which is a breach of one of the fundamental rules of natural justice. For these reasons I would allow the appeal with costs and set aside the said order of 15th January, 1993.

Dated and delivered this 11th day of December, 1998.

G.S. Pall

JUDGE OF APPEAL