IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Kwach, Cockar & Muli JJ A)

CIVIL APPEAL NO 157 OF 1991

Between

COMMERCIAL BANK

OF AFRICA LIMITED....................................APPELLANT

AND

ISAAC KAMAU NDIRANGU ....RESPONDENT

(Appeal from the Ruling of the High Court of Kenya at Nairobi (Mr Akiwumi J) delivered on 2nd June, 1988

in

HCCC No 1803 of 1985)

****

JUDGMENT

Kwach JA. It is a fundamental tenet of the rule of law that court orders must be obeyed:

This appeal is essentially about alleged flagrant disobedience of a court order by one of the parties and its advocates. Advocates who aid and abet their clients to disobey or circumvent court orders must understand that they are as much liable to be committed for contempt of court as their clients. If any authority were needed for this perfectly obvious proposition, it can be found in the cases of *Marengo v Daily Sketch & Sunday Graphic Ltd* [1948] 1 All ER 406; *Elliot v Klinger* [1967] 3 All ER 141; and *Acrow (Automation) Ltd V Rex Chainbelt Inc* [1971] 3 All ER 1175.

Isaac Kamau Ndirangu (the respondent) charged a number of his properties to the appellant, Commercial Bank of Africa Ltd (the Bank), including plot LR No 12241, Nairobi to secure advances made to him by the Bank. When the respondent defaulted with repayment, the Bank moved to exercise its statutory power of sale. To forestall this, the respondent filed a suit in the superior court seeking a multiplicity of reliefs including an injunction restraining the Bank, its servants or agents from selling his properties and a declaration that the Bank was not entitled to sell the said properties by public auction or otherwise.

The respondent then applied for a temporary injunction under order 39 of the Civil Procedure Rules, and on 12th February 1987, when the matter came before O Connor J, it was ordered by consent:

"(1) That Ms Coopers & Lybrand, Accountants & Auditors, be and are hereby appointed to examine all the accounts between the plaintiff and the defendant from commencement to date including without exception all advances made to the plaintiff, all payments made to the defendant by the Coffee Board of Kenya or other parties on behalf of the plaintiff including all interest charged and application of interest.

(2) That both parties to surrender all the documents and other related material pertaining to the said Ms Coopers & Lybrand and to cooperate fully with them in the exercise.

(3) That Ms Coopers & Lybrand be and are hereby at liberty to summon any witnesses they deem necessary and/or to requisition for any materials from any party or witness as they deem fit.

(4) That the plaintiff do pay the auditors & accountants fees for the said Ms Coopers & Lybrand for the exercise and to deposit such sums as may be requested by them before the commencement and to deposit the said fees within 15 days from today.

(5) That Coopers & Lybrand to file their report in court with copies to the parties within 10 days from the date of the completion of the exercise.

(6) Pending the report of the auditors and/or further orders of the Court status quo to be maintained. No other plots except the 11 sub divisions more particularly from LR No 12565 shall be sold by the defendant and the transfer of those plots not be effected within 45 days.

(7) That the sale of LR No 12241 be and is hereby stayed. The plaintiff be and is hereby at liberty to procure the sale of LR 12241 for a higher price than Shs 4M/- within the next 60 days and the proceeds of the sale of the said plot be deposited with the defendant and that condition to be stipulated in the agreement for sale by the plaintiff.

(8) That case be mentioned on 1st day of April, 1987.

(9) That there be liberty to apply.

(10) That costs to the defendant.

(Underlining mine)."

It is to be noted that the consent order was made in the presence of counsel for both parties. So I am entitled to hold as I do, that its meaning and import was clear to the advocates and the parties. The status quo was to be maintained, the sale of plot LR No 12241 was stayed except that the respondent was given 60 days within which to sell the plot if he could sell it at more than Kshs 4M/-. The reason for this stipulation was because on the 16th January 1987, the Bank had entered into a contract with one Richard Maina, to sell this property to him at Shs 4,000,000/-. The original date of completion was 31st March, 1987, which was later changed to 15th April, 1987. The respondent felt the Bank was trying to sell at a gross undervalue and for that reason it was agreed that the respondent could try to sell elsewhere at a higher price.

I have read that consent order very carefully, and the way I understand it, it is that the sales of plot LR No 12241 was stayed, but the respondent was authorized to sell it if he could find a buyer for it at more than Shs 4M/-, within 60 days. The plain meaning of this is that if the respondent failed to sell within that period, the property reverted back into the ambit of the order. The Bank could then, exercising its right under the liberty to apply clause, apply to the Court for leave to go back and sell to Richard Maina. The consent order did not permit the Bank, in the event the respondent failed to get a buyer within 60 days, to go ahead and sell to Richard Maina, or anyone else without the intervention of the Court.

As ill luck would have it, the respondent failed to get a buyer at more than Shs 4M/- within 60 days. Apparently on the advise of its advocates, and without reverting back to Court, the Bank, in purported

exercise of its statutory power of sale, sold and transferred plot LR No 12241, Nairobi, to Richard Maina, on 17th August 1987 at a consideration of Shs 4M/-.

The sale to Richard Maina by the Bank was transacted without the Court or the respondent being informed. The first time the respondent learnt about it, at least officially was when the letter from Muthoga Gaturu & Company, Advocates, dated 18th September 1987, arrived at the firm of Kilonzo & Company, Advocates, who were then acting for the respondent. It stated:

> "Dear Sirs,
>
> LR No 12241- Commercial Bank of Africa Ltd
>
> We have been instructed by our client above named to write to you as follows;
>
> Pursuant to the court order of 12th February 1987, under which it was agreed that the sale of 11 sub-divisions could be finalized and land parcel No 12241 sold after 60 days of that date, our client went ahead and sold the plot to one Richard Maina for Shs 4,000,000/- and effected transfer to him on 18th August, 1987, and the title deed is now in his name as the owner instead of your client.
>
> All the 11 sub- divisions have now been sold and all the money paid out to our client towards the recovery of the loan.
>
> In the premises kindly instruct your client to stop interfering with the land in question since it no longer belongs to him.
>
> Having sold the land, our client has nothing more to do with the sale of that plot and we are by a copy of this letter inviting Ms Daly & Figgis, Advocates and M/s Kagwe & Company to do what they can in protecting their clients' (sic) interests in this matter.
>
> Yours faithfully
>
> for Muthoga Gaturu & Company
>
> E T Gaturu"
>
> (Underlining mine).

The claim by Gaturu Muthoga & Company, Advocates, in their letter that under the consent order of 12th February 1987, it had been agreed that parcel LR No 12241 could be sold by the Bank after 60 days, was a gross distortion of the terms of the consent order. The sale of LR No 12241 had been expressly stayed and only the respondent had been given permission to sell it if he could find a buyer for it at more than Shs 4,000,000/- within 60 days. That limited power of sale was not given to the Bank. It is plain beyond a paradventure that the sale of plot LR No 12241 by the Bank to Richard Maina was undertaken in breach of the consent order of 12th February, 1987.

On the 23rd October 1987, the respondent made an application under order 39 rr 1, 2 & 3 of the Civil Procedure Rules seeking an injunction to restrain the Bank from alienating transferring or otherwise parting with the possession of parcel LR No 12241 and an order suspending, setting aside, staying or otherwise prohibiting the registration of the transfer of this piece of land to Richard Maina. The application was supported by the affidavit of the respondent to which he annexed a copy of the transfer in favour of Richard Maina, among other documents. This is the application, which came before Akiwumi J on the 19th May 1988. He delivered his ruling on 2nd June 1988, and made an order setting aside the sale of the suit land to Richard Maina and prohibiting the registration of such sale if it had not taken place, and if it had, nullifying and declaring it to be of no legal effect whatsoever. It is against that ruling and order that the Bank has appealed to this Court.

Although this order had the effect of depriving Richard Maina of his property rights and was therefore prejudicial to him, it was made without giving him an opportunity of being heard and in his absence. Counsel who appeared before Akiwumi J, who included Mr E T Gaturu for the appellant, did not address the Judge on the necessity of involving Richard Maina in the proceedings although he was clearly an interested party.

Although the application was expressly brought to challenge the sale and transfer to Richard Maina, he did not apply to be joined as a party. And even after the Judge had made an order nullifying the sale and transfer to him, he did not appeal against it as he could have done if he wished to do so under rule 74(1) of the Court of Appeal Rules. It is also to be noted that although the appellant's advocates knew or ought reasonably to have known that Richard Maina was clearly a person directly affected by the appeal within the meaning of rule 76(1) of the Court of Appeal Rules, they did not serve him with the notice of appeal. The decision to serve Richard Maina with the record of appeal was made by the Court when the appeal first came on, on 11th March1992. He instructed counsel who has appeared and made submissions on his behalf.

The decision of the learned judge has been challenged on some 12 grounds of appeal but in my view they can conveniently be reduced to 2 namely:

> "(1) That the Judge erred in law and in breach of the rules of natural justice in making the order setting aside the sale of the suit premises to Richard Maina and nullifying the registration in his favour without giving him an opportunity of being heard: and
>
> (2) That the sale by the appellant of LR No 12241 to Richard Maina was in exercise of the appellant's statutory power of sale and in accordance with the consent order made on 12th February 1987, and that in doing so, the appellant was not in contempt of court".

Mr Gaturu, for the Bank submitted that since the parcel in question had been sold and transferred to Richard Maina, the order depriving him of the same and cancelling the registration in his favour should not have been made without giving him an opportunity of being heard and that in doing so, the Judge committed a breach of one of the fundamental rules of natural justice, namely that a party should not be condemned without being heard. If Richard Maina had appealed against the decision of the judge as he was entitled to and this submission had fallen from the lips of his counsel, I would have had no difficulty at all in accepting it. My reluctance to accept it springs from the fact that the Bank, who had deliberately flouted the order of the Court, is now seeking by a side wind, to take advantage of possible prejudice to Richard Maina, who was not a party to the proceedings and has not come to this Court as an appellant to complain against the order.

Mr Kairu, whom we allowed to make submissions on behalf of Richard Maina, also attacked the order on the ground that it was made in breach of the rules of natural justice and urged us to set it aside. He read to us a passage from the speech of Lord Reid in the well known English case of *Ridge v Baldwin* [1963] 2All ER 66 at page 73-H, where he said:

> "I would start an examination of the authorities dealing with property rights and privileges with *Cooper v Wandsworth Board of Works*. Where an owner had failed to give proper notice to the Board, they had under an Act of 1885 authority to demolish any building which he had erected and recover the cost from him. This action was brought against the Board because they had used that power without giving the owner an opportunity of being heard. The Board maintained that their discretion to order demolition was not a judicial discretion and that any appeal should have been to the Metropolitan Board of Works. But the Court decided unanimously in favour of the owner.
>
> Erle CJ, held that the power was subject to a qualification repeatedly recognized that no man is to be deprived of his property without his having had an opportunity of being heard and that this had been applied to 'many exercises of power which in common understanding would not be at all a more judicial proceeding than would be the act of the district board in ordering a house to be

> pulled down.’ Willes J said that the rule was ‘of universal application and founded on the plainest principles of justice’ and Byles J, said that:
>
> ‘Although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the Legislature.’”

Mr Kairu also relied on the case of *Oloo v Kenya Posts & Telecommunications Corporation* [1982-88] 1KAR 655, which is a decision of this Court. The appellant who had previously retired from the Corporation and had been awarded gratuity and reduced pension, had his pension suspended after being reemployed without being given an opportunity of being heard. The suspension was to last until he attained the age of 50, when he would have been eligible for a full pension on normal retirement. He brought an action for a declaration that the suspension of his pension was unlawful, but the trial Judge dismissed the claim. He appealed, and in allowing his appeal the Court held, *inter alia*, that the Corporation’s action in recalling the appellant to duty with the suspension of his pension was an act to his prejudice, and he should have been afforded an opportunity of making representations and of giving an explanation before being required to accept further office with the corporation.

In the course of his judgment, Madan JA (as he then was) said at page 659:

> “The reasons for the need actually to comply with the rules of natural justice were well put by Megarry J in *John v Rees* [1969] 2 WLR 1294:
>
> ‘It may be that there are some who would decry the importance which the Courts attach to the observance of the rules of natural justice.’
>
> “When something is obvious”, they may say, “why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard?” The result is obvious from the start. “Those who take this view do not, I think, do themselves justice”’. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.”

The passages in these cases state the law correctly and that is the law as it applies in Kenya.

Mr Gatonye, for the respondent, on the other hand, submitted that although the order against Richard Maina was made in breach of the rules of natural justice, this should not be looked at in isolation, but should be considered in the context of the consent order which the Bank had flagrantly disobeyed.

I think this submission has considerable merit. Granted that the rules of natural justice have been breached, this Court should not lose sight of the fact that a valid order of the Court had been flouted in a most contemptuous and callous manner. Since there is a conflict, I have to decide whether to uphold the rules of natural justice or the authority and dignity of the Court. Richard Maina, who was prejudiced by the order, did not appeal against it. He did not appear before the Judge to contest the application either. We have been informed from the bar that he has taken appropriate steps to seek redress from the Bank. So he has a remedy. The Bank should not be allowed to take advantage of its own contempt. This ground of appeal therefore fails.

The second ground of appeal can be disposed of very briefly. The consent order stayed the sale of LR No 12241, Nairobi. But it gave the respondent 60 days within which to sell it if he could get a buyer at a price of more than Shs 4M/-. He failed to get a buyer so the status quo remained. The order did not give the Bank the power to sell even if the respondent did not find a buyer. The Bank’s right to sell in exercise of its statutory power had been expressly stayed under the terms of the order. So the Bank had no right to

sell either in the exercise of its statutory power of sale or under the terms of the order without the sanction of the Court. It follows that this ground of appeal also fails.

I would like to commend the Judge for taking the course he did. It is only by acting swiftly and firmly when an order of the Court is flouted that dignity and authority of the Court can be upheld.

For these reasons, I would dismiss the appeal with costs to the respondent. As Cockar and Muli JJ A also agree, it is so ordered.

Cockar JA. I have had the benefit of perusing in draft the judgments of my learned brothers Kwach and Muli, JJ A with which I entirely agree . Briefly the facts giving rise to this appeal are that on 21st June, 1985, the respondent filed a plaint seeking *inter alia* an injunction to restrain the appellant (hereafter referred to as the Bank) from trespassing in order to carry out the threatened sale by private or public auction or otherwise of his properties being LR No 12241, Nairobi (hereafter referred to as the suit land), two plots of land in Nairobi being LR No 12239 and 12240 and eleven other plots being sub-divisions of plot LR No 12565 all of which were charged to the Bank to secure various loans. The Bank filed its defence and counter-claim and the pleadings closed with the filing by the respondent of his reply to defence and defence to counter-claim. Various interlocutory applications seeking injunction and other reliefs followed. Eventually under a consent order recorded on 12th February, 1987, after referring the examination of all the accounts between the parties to M/s Coopers & Lybrand, Accountants & Auditors, and after prescribing the conditions and procedure relating to submission of their report, the Court further ordered as follows:

> "6. Pending the report of the auditors and/or further orders of the Court status quo to be maintained. No other plots except the II sub-divisions more particularly from LR 12565 shall be sold by the defendant and the transfer of those plots not to be effected within 45 days.
>
> 7. That the sale of LR 12241 be and is hereby stayed. The plaintiff be and is hereby at liberty to procure the sale of LR 12241 for a higher price than 4 Million within the next 60 days and the proceeds of sale of the said plot to be deposited with the defendant and that condition to be stipulated in the agreement for sale by the plaintiff.
>
> 8. That case to be mentioned on 1st day of April, 1987.
>
> 9. That there be liberty to apply.
>
> 10. That costs to the defendant.
>
> (Underlining is mine.)"

The said auditors submitted their report as required but the respondent was unable to sell the suit land (plot 12241) within the specified period of 60 days. Upon submission of the auditors' report the respondent filed an application to have the report set aside while the Bank made an application to strike out the respondent's suit and to enter judgment for the Bank on its counter-claim. In its ruling dated 29th June, 1987, relating to both the applications the learned Judge declined either to strike out or to act on the auditors' report on the ground that it offended the rules of natural justice but entered judgment for the Bank in the sum of Shs 8,068,002/72cts which is held on the available affidavit evidence, to have been admitted as owed by the respondent to the Bank. The respondent filed a notice of appeal against the ruling on 1st July, 1987, and, following an *inter partes* hearing on 31st July, 1987, of an application for stay of execution of the judgment , the Court granted the respondent's prayer for stay of execution on 7th August, 1987. On 17th August, 1987, the Bank transferred the suit land to one Richard Mbui Maina (hereinafter referred to as the interested party) in consideration of a sum of four million shillings (Shs 4,000,000/-). That prompted an application by way of chamber summons filed on 27th October, 1987, by M/s Kilonzo & Co, Advocates, on behalf of the respondent, seeking an injunction to stop the sale of the suit land and *inter alia* to set aside, or uplift or prohibit registration of the suit land pending final disposal of all the appeals filed from decisions in respect of the various applications and the final disposal of the suit. The

chamber summons was heard and on 2nd June, 1988, the learned Judge in view of the consent order made on 12th February, 1987, and the order for stay of execution of decree granted on 7th August, 1987, which in his view was an extension of the consent order, found the appellant's act of sale of the land to be in contempt of court and for that reason he declined to consider the submission that the sale was in a proper exercise of a chargee's right of sale. In the circumstances he ordered the sale to the interested party to be set aside and its registration to be prohibited, if not already effected.

The interested party was neither made a party to the above proceedings nor was he present during the hearing of the above chamber summons.

This appeal, arising from the above ruling of 2nd June, 1988, of Akiwumi, J, is based on twelve grounds. However, there are only two grounds which are of consequence and which were argued at length. These are :-

> 1. That under the consent order of 12th February, 1987, on failure of the respondent to sell the suit land for a sum of over Shs 4,000,000/- within the agreed period the Bank then became entitled to sell it under its chargee's right to sell.
>
> 2. Against the rules of natural justice the interested party, who was an innocent purchaser, was being deprived of his property without being given an opportunity to be heard.

As to the consent order Mr Gaturu for the Bank contended that the stay with regard to the suit land was granted for 60 days in order only to enable the respondent to find a purchaser for over Shs 4 Million. So on failure of the respondent to find a buyer for the suit land the stay lapsed and the position reverted to the status quo prescribed in paragraph 6 of the said consent order. Under the status quo there was no other order by the Court which restrained or affected the Bank's right to sell as a chargee which right the Bank had then proceeded to exercise.

With respect I do not agree with Mr Gaturu's interpretation of paragraphs 6 and 7 of the consent order. In the first place the report submitted by the auditors, instead of being accepted, was being hotly contested. Further in addition to prescribing the observance of a status quo paragraph 6 had specifically prohibited the sale of any other plots except the eleven sub-divisions mentioned therein. That prohibition therefore applied to the suit land also. But as an agreement of sale had already been executed on 16th January, 1987, between the Bank and the interested party the stay of the sale of the suit land that was granted in paragraph 7 of the said order was meant to stop any further steps being taken under the said agreement in respect of the suit land. This stay was made subject to one exception only which is described in the said paragraph seven and which was the liberty that was granted therein to the respondent only to sell the suit land within 60 days. The prohibition to sell and the stay of sale granted in the said two paragraphs had, in my view, effectively neutralized the Bank's right as a chargee and its obligation under the said agreement of sale, to sell. In neither of these two paragraphs is there any provision for the right to sell to ensue to the Bank under any eventuality.

However, in paragraph 9 of the consent order there is a provision for either party to be at liberty to apply for further orders. Thus when the respondent failed to find a purchaser within the prescribed period it was then up to the Bank to have applied to the learned Judge for further orders and thereby pave the way to the eventual sale of the suit land in exercise of the power vested in it under the charge. Instead of following the laid down steps to obtain the remedy the Bank flouted both the order to which it had consented and the stay of execution order that was granted by court clearly to protect the suit land from being sold in execution for recovery of the judgment sum which step would have defeated the purpose of the consent order which was to protect the suit land from being sold until further orders of the Court. The learned Judge, in my view, was justifiably outraged at such a blatant flouting of the court's order. I reject submissions made by Mr Gaturu under this head.

Coming now to the issue that the ruling of 2nd June, 1988, was going to deprive an innocent purchaser of his property Mr Gaturu repeatedly stressed that the rules of natural justice had been gravely offended because the ruling was going to affect directly the interested party's ownership of the suit land without his

having been given an opportunity of being heard. The learned judge having been alerted of the interest of the interested party should have given directions for him to be joined and heard.

It is to be noted that the interested party had not appealed against the ruling although he could have done so had he so wished – Court of Appeal Rules, rules 74 and 76(1). It was as a result of appropriate steps taken by Mr Gaturu for the Bank, on a direction from this Court, that on the day of the hearing of the appeal Mr Richard Kairu appeared on behalf of the interested party. He had no right to address the Court but we nevertheless allowed him to make submissions on behalf of the interested party and he did so. He strongly supported Mr Gaturu's submissions that the rules of natural justice had been breached by the learned Judge in his ruling which had so detrimentally affected the interests of the interested party without his having been given an opportunity of being heard during the hearing of the chamber summons.

Mr Gatonye, advocate for the respondent, fully aware of the gravity of the error and injustice in a proceeding whereby an innocent purchaser was condemned without having been given an opportunity to be heard, submitted that the learned Judge was faced with a conflict between a deliberate disobedience of a court order on one side and the rules of natural justice on the other. The Bank with no other valid ground was merely using the breach of rules of natural justice to escape the consequence of its deliberate disobedience of the court's order. In his view the learned Judge was right in finding a contempt and setting aside the sale.

Rules of natural justice are the foundation of a judicial system. Their observance is universal. But, at the same time, a flagrant disobedience of a court order, if allowed to go unchecked will result in the onset of an erosion of judicial authority. The conflict in this case in my view, is not difficult to resolve. The interested party apparently had prior knowledge of the filing of the chamber summons – refer to 1st paragraph of his letter dated 9th February, 1988, addressed to M/s Kilonzo & Co who were the advocates of the respondent at that time. This letter was written within three months of the filing of the chamber summons on 27th October, 1987, and a little over three months before its hearing commenced on 19th May, 1988. So although it was imperative for either the respondent in the first instance, or the Bank or even the Court to have the interested party joined in the proceedings, the fact remains that the interested party had the opportunity to take steps to be joined and to make representations during the hearing of the chamber summons but he declined to do so. In fact his reason for not doing so and his apparent apathy in this matter become clear from the contents of this letter wherein he had offered the suit land back to the respondent on return of the purchase sum and the interest he had paid in respect of the loan he had to raise. So the argument of his being deprived of his property without being heard loses its sting. In fact it was confirmed by all the learned advocates that the interested party had already filed a suit against the Bank to obtain appropriate redress. In light of these exceptional circumstances appertaining to the breach of the rules of natural justice, I am of the view that the learned trial Judge made the right decision.

I whole-heartedly agree that this appeal be dismissed in terms as proposed by Kwach, JA.

Muli JA. I have had the advantage of reading in draft the judgements of my noble learned brothers Kwach and Cockar JJ A and I concur with their conclusions and the orders proposed by my noble learned brother Kwach JA.

The respondent, Isaac Kamau Ndirangu, charged his many properties to the appellant Bank (the Bank) as securities for financial advances made to him from time to time by the Bank. Amongst the many properties was property No LR 12241 which is the subject matter of this appeal and which I will hereinafter refer to as "the suit land". The Bank being the chargee of the suit land and the other properties had the statutory power of the sale under the charges and this fact was not in dispute. The respondent defaulted in repayments and being apprehensive that the Bank might exercise its statutory power of sale under the charge he instituted an action against the Bank on 21st June, 1985 claiming, *inter alia*, injunction to restrain the Bank, or its agents from selling the suit land by private treaty or by public auction. The Bank filed its defence and counter claim. There followed various interlocutory matters culminating with the interlocutory application for injunction in which the respondent sought to restrain the Bank from exercising its statutory power of sale of this suit land pending the determination of the substantive suit then pending in the High Court.

In the meantime, the Bank, in exercise of its power of sale entered into the sale agreement dated 16th January, 1987 between itself and the prospective purchaser, Richard Mbui Maina for the sale of the suit land (LR 12241) at the agreed price of Ksh 4,000,000; completion date being stipulated to be 31st March, 1987 which was changed to 15th April, 1987.

When the application for injunction came for hearing on 12th February, 1991 an order was entered by consent of the parties as follows:-

> "It is ordered by consent:-
>
> 1. Not relevant
>
> 2. Not relevant
>
> 3. Not relevant
>
> 4. Not relevant
>
> 5. Not relevant
>
> 6. Pending the report of the auditors and/or further orders of the Court status quo to be maintained. No other plots except the 11 sub- divisions more particularly from LR 12565 shall be sold by the defendant and the transfer of those plots not to be affected within 45 days.
>
> 7. That the sale of LR 12241 be and is hereby stayed. The plaintiff be and is hereby at liberty to procure the sale of LR 12241 for a higher price than 4 Million shillings within the next 60 days and the proceeds of the sale of the said plot to be deposited with the defendant and that condition to be stipulated in the agreement for sale by the plaintiff.
>
> 8. That case to be mentioned on 1st day of April, 1987.
>
> 9. That there be liberty to apply.
>
> 10. That costs to the defendant.
>
> (underline is mine)"

The respondent was unable to sell the suit land (LR 12241) within the specified period of 60 days. The case was not mentioned on the 1st April, 1987, and if it was , no further orders were made. Neither the respondent nor the Bank applied to the Court under the specific order that the parties had liberty to apply. On the 17th August, 1987, the Bank transferred the suit land to the earlier prospective purchaser Richard Mbui Maina, (the interested party) without reference to the Court for variation of the consent order or for any other or future orders.

There can never be any doubt that the transfer of the suit land was furtherance of the sale agreement of 16th January, 1987 and which sale was specifically prohibited under paragraph 7 of the consent order which stayed the sale of the suit land (LR 12241) except by the respondent, if he was able to secure a purchaser for over 4 Million shillings within 60 days which period had already expired without any success.

The transfer of the suit land by the Bank to the interested party or to anyone else was in complete disregard of the court order of 12th February, 1988. The consideration of the sale was still Kshs 4 Million as was stipulated in the sale agreement of the 16th January, 1987 between the Bank and the interested party.

On 27th October, 1987, the respondent filed a belated application by way of a chamber summons seeking

an injunction to stop the sale of the suit land or to set aside the sale or to prohibit registration of the said suit land. The chamber summons came for hearing before Akiwumi J who delivered his ruling on 2nd June, 1986. In his ruling he held that the sale of the suit land was done in contemptuous circumstances and ordered in effect that the sale of the suit land be set aside. The relevant part of the ruling is as follows:-

> "But as I have already observed the sale of the suit land and the registration of the sale cannot be allowed to stand and must be nullified. In view of the decision of this Court that the sale of the suit land was in contempt of this Court it is not necessary to go into the questions argued in the present application whether the sale was in proper exercise of the right of the sale of the defendants Bank as chargee. Since the order of the Court made on 7th August, 1987 granting stay of execution still stands unchallenged, the only order I think I can now make, is that the sale of the suit land to Richard Mbui Maina is hereby set aside and the registration of such sale prohibited if it has not yet taken place, and if it has, is hereby nullified and declared to be of no effect whatsoever. The plaintiff will have his costs."

Hence this appeal.

There is no doubt whatsoever in my mind that the effect of paragraph 6 of the consent order was to stay all further transactions in respect of the suit land as status quo had been ordered to be maintained. Paragraph 7 thereof is specific that the sale of the suit land (LR 12241) was stayed. This sale must refer to the sale agreement dated 16th January, 1987 or any other sale. Paragraph 8 thereof ordered for the case to be mentioned on 1st April, 1987 which date was before the stipulated date of completion of the sale agreement of 16th January, 1987. Paragraph 9 thereof gave the parties liberty to apply. Despite all these clear provisions of the court consent order, the Bank completed the agreement and transferred the suit land to the interested party in complete defiance of the court order of 12th February, 1987. Both Mr Gatonye for the respondent and Mr Kairu for the interested party appeared to accept this position. The Bank being aggrieved by the ruling and the orders made by Akiwumi J appealed to this Court. Mr Gaturu who appeared for the Bank both at the Superior Court and before us filed some 12 grounds of appeal in the Memorandum of Appeal. He argued grounds 1, 2, 3, 4, 5 and 6 together and grounds 7, 8, 9 together and finally grounds 10, 11 and 12 together. To me, the grounds of appeal taken together may be summed up into three propositions, namely:-

1. Whether the consent order of 12th February, 1987 remained "unscathed" or not, and

2. Whether the Bank and/or the interested party were in contempt of the court consent order of 12th February, 1987, and

3. Whether the Court was in breach of the rules of natural justice in declaring the sale of the suit land and registration thereof in favour of the interested party to be null and void and of no effect.

Mr Gaturu for the Bank argued that equity of redemption was extinguished after the Bank had transferred the suit land to the interested party under its statutory power of sale and therefore nullification of the registration thereof was contrary to section 60 of the Transfer of Property Act. There was a consent order which had been flouted. The clear wording of the consent order leaves no room for speculation or ambiguity. The statutory power of sale which the Bank could exercise had been curtailed and comprised by the consent order to the effect that the sale of the suit land (LR 12241) was stayed and that order was not in any way varied by any other order or orders. There was a specific order granting the parties liberty to apply but no party availed itself of this liberty with the result that the consent order of 12th February, 1987 remained "unscathed". The answer to 1 above is in the affirmative. I find nothing to mitigate the complete disobedience of the court order by the Bank. Section 60 of the Transfer of Property Act could not be invoked in aid of the Bank in respect of the provisions related to extinguishment of equity of redemption.

Mr Gaturu urged us further to hold that the consent order was not breached by the Bank because after the 60 days granted to the respondent to sell the suit land for over 4 Million shillings had expired without the

allowed sale taking place, the parties reverted to their original status with the result that the Bank had liberty to exercise its statutory power of sale and to proceed with the stayed sale between itself and the interested party.

Mr Gatonye for the respondent contended that the sale by the Bank was contemptuously made and was therefore unlawful and void. The consent order was made by consent of the parties and the Bank must be held to be a party thereto. On the face of it, consent order was clear and unequivocal. Sale of the suit land (LR 12241) was clearly stayed. The Bank did not avail itself of the liberty granted by the Court to apply. Instead, the Bank with the advice by its advocate went ahead and sold the very suit land in complete disobedience of the Court order. What else can be said in favour of the Bank other than it was in contempt of the court order to proceed with the very sale of the suit land which had been specifically stayed and prohibited by the court's consent order. In these circumstances I am unable to agree with Mr Gaturu's contention that the consent order was not breached.

Mr Kairu who appeared for the interested party by invitation of the Court supported Mr Gaturu and urged us to hold that, the learned Judge, having found that there was contempt of court, he should not have proceeded to annul the sale and the registration of the suit land in favour of the interested party without giving the said party an opportunity to be heard since legal ownership of the suit land had already vested in him; that the nullification of the registration was wrong because it amounted to punishing the interested party for contempt committed by another party.

Mr Kairu appears to concede that there was contemptuous breach of the court consent order. His only plea was that the interested party was not served with the consent order and the Court should have ordered him to be joined as a party to the suit. The interested party was not a party to the suit before the Superior Court and has never been a party to any of the proceedings in the Superior Court. He came to this Court through the generous invitation of the Court. Notwithstanding, Mr Kairu was invited to address us on behalf of the interested party. Although the interested party may not have been served with the consent order, he was aware of the transactions and proceedings between the Bank and the respondent. He had entered into the sale agreement with the Bank to purchase the suit land. He was aware that the sale had been stayed by the court order and this explains why the sale was not completed on the stipulated date. Being aware that his legal rights were being threatened he should have applied to be joined as a party to the suit or proceedings in order to be able to defend his legal proprietary rights, if any. He did not do that. He should have appealed against the orders of Akiwumi J if he was aggrieved. He did not do that either. Instead he went ahead to sue the respondent and the Bank so we heard from the bar, against whom he thought his remedy lay. Although he was invited by this Court to be heard and his counsel was indeed heard, still he is not a party to this appeal. The upshot is that he has no *locus standi* before this Court and cannot expect to reap any benefit from court proceedings to which he is not a party.

The interested party was an active player on the stage. He was fully aware that the sale of the suit had been stayed by the Court. In these circumstances he cannot properly claim that he was an innocent purchaser for value without notice. He was partisan to the contempt of the court order.

It is imperative that orders of the Court must be obeyed as a cardinal basis for endurance of judicial authority and dignity. To do otherwise woulad erode the dignity and authority of the Courts. The blatant disobedience of the court's consent order in this case renders any transactions in breach of the order to be void and the learned Judge was fully justified in making the orders complained of. To allow the appeal would be tantamount to rewarding the guilty parties for this grave contempt of court. The second proposition above is in the affirmative.

Regarding the question of breach of the rules of natural justice, I have come to the conclusion that the interested party was an active player on the stage. He knew all along what was happening and decided not to take any action to defend his legal proprietary rights, if any. He was aware of the orders made by Akiwumi J and should have appealed against those orders if he was aggrieved. Rule 74 of the Rules of this Court provide for such eventuality.

Courts of this Country are fully mindful of the essence of the observance of the rules of natural justice.

Indeed they are observed as a matter of our judicial system. It is then well established law that no one should be condemned unheard. The interested party chose not to be heard by the Superior Court or to appeal against the orders made by it. In these circumstances, the interested party cannot be heard to cling on the breach of the rules of natural justice. He was the author of his own misfortune. The learned Judge was fully justified in annulling the sale and canceling registration thereof notwithstanding that the interested party had not been heard. The answer to 3 above is in the negative. The sale of the suit land in breach of the court order was a nullity and of no effect.

For these reasons I would dismiss this appeal with costs.

Dated and delivered at Nairobi this 26th day of June, 1992

R.O KWACH

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JUDGE OF APPEAL

A.M COCKAR

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JUDGE OF APPEAL

M.G MULI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR