REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appli. Nai 165 of 2000 (73/2000 UR)

1. LALCHAND FULCHAND SHAH

2. RAMBHABEN LALCHAND SHAH..... APPLICANT

AND

INVESTMENTS & MORTGAGES BANK LIMITED..... RESPONDENT

(An application for relief under Rule 5(2)(b), Court of Appeal Rules in an intended appeal from the Ruling of the High Court of Kenya at Nairobi (Hon. Mr. Justice Mbaluto) dated 18th February, 2000

in

H.C.C.C. NO. 2533 OF 1997)

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RULING OF SHAH, J.A.

The two applicants before this Court, Lalchand Fulchand Shah and Rambhaben Lalchand Shah who are husband and wife respectively (hereinafter referred to as "the Shahs") have moved this court under rule 5(2)(b) of the Rules of this Court for orders that the respondent, Investments & Mortgages Limited (hereinafter referred to as "the Bank") be restrained by itself its officers agents or servants or otherwise howsoever from auctioning the Shahs' property known as L.R. No.209/66/41 (the suit property) on 22nd June, 2000 (now past) as advertized or at all and from alienating the suit property in any manner whatsoever until the determination of "this" appeal. By "this" appeal the Shahs' obviously mean the intended appeal.

The ruling which the Shahs eventually intend to appeal against was delivered by the superior court (Mbaluto, J) on 18th February, 2000. By that ruling the learned Judge dismissed the Shahs' application for an injunction to restrain the Bank from selling the suit property pending the hearing and determination of H.C.C.C. No 2533 of 1997 filed in the Commercial Division of the superior court at Milimani on 7th October, 1997.

The history of the matter is that the Shahs were approached by one Sulu Shah, a director of Shah Motors Limited in February, 1997 to give a guarantee for payment of sums due by Shah Motors Limited (hereinafter referred to as "the Borrower") to the Bank. They executed a charge on the suit property to enable the Borrower to obtain advances from the Bank by way of loan or for the Bank to refrain from demanding immediate payment of moneys already due by the borrower to the Bank. The amount so secured is referred to as the "Prescribed Maximum Debt" in the charge itself and is defined as not

exceeding Shs.30,000,000/=.

The Borrower did not pay the debt due by it to the Bank and the Bank proceeded to realize its security by attempting to sell the suit property after giving the requisite three (3) month's notice. This notice was issued by the Bank's advocates M/S Walker Kontos by their letter of 11th June, 1997 by which letter a demand of Shs. 30,710,137/00 was made from the Shahs by the Bank. The Bank told the Shahs that unless they paid that sum within 3 months of the date of that letter the Bank would exercise its statutory power of sale.

The Shahs responded to that letter by their advocates' letter

of 13th August, 1997 in the following terms:

"Our clients require a full statement of account of all advances made to the borrower which have been allegedly secured by the charge that you refer to. In particular, they wish to have details of the dates of all payments made and the accounts into which these were banked. Please also let us have a copy of the valuation report of the allegedly secured property which is in your client's possession.

While we await this information that we have asked you for, please take notice that it is our contention that the charge in question is null and void, and that any action taken by your client in the purported exercise of its alleged statutory power of sale will be resisted."

Mr. Nowrojee who appeared with Mr. Sheetal Kapila for the Shahs put forward three issues to attempt to show that they have an arguable appeal, or at least not a frivolous appeal.

The first issue taken up by Mr. Nowrojee was that the notification of sale dated 26th April, 2000 showed the amount outstanding as at 31st March, 2000 at Shs.141,370,541/62 whereas the amount demanded in the letter of 11th June, 1999 shows the amount at Shs.30,710,137/00. The serious issue, urged Mr. Nowrojee, is that the superior court has held that the figure of Shs.141,370,541/62 contained in the notification would appear to be erroneous. It is erroneous certainly but what does turn on it? The property is valued at Shs.20,000,000/=. There is no way Shs.141,781,798/= will be recovered by sale thereof. That figure as stated in the notification is only an irregularity of no consequence and does not go to the root of the dispute as the learned Judge has correctly pointed out. In any event rule 16(1) (f) of The Auctioneers Rules made under The Auctioneers Act, Act No. 5 of 1996 specifically states that the amount to be recovered need not be stated.

The other issue Mr. Nowrojee has taken is that the first notification of sale dated 16th October, 1997 did not provide for the 45 day notice as stipulated in rule 15(d) of the Auctioneer's Rules. Nothing, however, turns on that point now as no auction took place on 12th November, 1997. We note that the present Notification has given not less than 45 days within which the owner may redeem the property. If the Shahs wished to redeem the suit property by 22nd June, 2000 they could have paid the sum of Shs. 30,000,000 odd by pointing out that sum mentioned in the notification was erroneous.

The third issue taken up by Nowrojee is the more important one. The Shahs say that they appended their signatures at pages 24 and 25 of the charge. They say, however, that the signatures on page 24 were not attested by an advocate when they appended their signatures. There is therefore a serious allegation impliedly made against an advocate of the High Court, Mr. Harit Sheth, to the effect that he carried out the process of attestation in the absence of the chargors. If true this would expose Mr. Sheth to a serious misconduct charge at least. However, the Shahs confirm that they appended their signature to page 25 of the charge on their own. They signed that page to say that they have understood the effect of section 69(1) of the Transfer of Property Act 1882 of .India as amended by the Indian Transfer of Property Act (Amendment)

Act 1959; they say that the purport thereof was not explained to

them; the penultimate paragraph thereof however, reads:

"We the above-named chargor have had explained to us the above sections and confirm that we understand the same".

The statements by the Shahs, on one hand, suggesting that their signatures were not attested by Mr. Sheth and on the other hand that they have had explained to them Sections 69(1), 100A and 100A(1) of the Transfer of Property Act as well as section 46 of the Registration of Titles Act, are to say the least amazing.

If a document which is ex-facie totally valid and properly attested, a party to be charged therewith cannot simply get away from it by stating that an advocate did not attest it. Quite obviously if the Shahs had called upon Mr. Sheth to say that he appended his signature and placed his stamp in the absence of the Shahs, Mr. Sheth would deny the allegation. It would be very simple for any chargor to postpone an auction sale by simply saying that the charge is not properly attested. If such a state of affairs was allowed to be taken cognisance of there would be no end to the chargors streaming to courts to stop an auction sale on that ground. If the Shahs were serious about what they say in regard to attestation they ought to have filed a declaratory suit to avoid the charge by making the Bank, the borrower and Mr. Sheth defendants to that suit. Alternatively they could have added Mr. Sheth and the Borrower as co-defendant in the suit they have filed. If Mr. Sheth acted wrongfully he would possibly face the consequences. I also note that no irregularity is alleged against the Bank. None is pleaded or particularized. Even if I were to assume that the charge was not attested by Mr. Sheth, the Bank upon receiving the document was not required to inquire into the authenticity of the attestation. If a banker is presented with a charge ex-facie valid he is not put on any inquiry to ascertain if the advocate had signed in the presence or in the absence of the chargor. I agree entirely with the observations of the learned Judge when he says that in all circumstances the credibity of the Shahs is very doubtful.

However, Mr. Nowrojee urged that by statement under oath by the Shahs, of non-attestation at page 24 of the charge, shifted the burden to the bank to prove otherwise. The Bank was not a party to the charge. It was executed by the chargors and the borrowers. Obviously the Bank would not be in a position to deny the Shah's allegations as none of its officers would have been before Mr. Sheth. The fact of attestation or non-attestation is a fact peculiarly within the knowledge of the Shahs. General rule of evidence is that if a negative averment is made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies and who asserts the affirmative, is to prove it, and not he who avers the negative. It was therefore for the Shahs to positively prove the same at least to establish a prima-facie case with a probability of success. They could not do so by a mere assertion. As I pointed out earlier they ought to have made Mr. Sheth and the Borrower parties to the suit.

I see no merit in the argument that the charge was created for past consideration. The charge itself clearly states that it was being given for either further advances to be made or to give time to the borrower for repayment of past advances. The latter is good consideration.

I find no merit in the arguments advanced to show that there are substantial issues to be argued on appeal. The Shahs cannot argue any more on appeal. It would be futile, in my view, to say that there are arguable issues.

The Shahs complain that they are not told of what is due by the borrower to the Bank. The Bank pleads that it cannot divulge the borrower's account. That is so but the first applicant himself says in his affidavit in the superior court that Mr. Sulu Shah left the country on 3rd May, 1997 and in the wake of his departure revelations emerged that he had defrauded huge sums of money from a number of financial institutions including the Bank.

The success in the appeal could well be rendered nugatory if a stay is not granted. But this limb of Githunquri vs Jimba Credit principle need not be gone into now that I have found that there is no arguable appeal. Nevertheless if the Shahs were to succeed on appeal I see no impediment in their way to claim damages. There is no suggestion that the Bank cannot pay damages. If the Shahs bring in Mr. Sheth and the Borrower as co-defendants in the suit in the superior court and if they can prove what they say, they would probably be entitled to damages.

I am of the view that the learned Judge exercised his discretion faultlessly in declining to grant the injunction sought and I would not interfere with what he found, so as to enable me to say that there is an arguable intended appeal.

I would dismiss this application with costs.

Dated and delivered at Nairobi this 7th day of July, 2000.

A.B. SHAH

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JUDGE OF APPEAL