



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

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

1. LALCHAND
FULCHAND SHAH

2. RAMBHABEN LALCHAND SHAH..... APPLICANTS

AND

INVESTMENTS & MORTGAGES BANK LIMITED RESPONDENT

(An application for relief in an intended appeal from the ruling of the High Court of Kenya at Nairobi (Justice Mbaluto) dated 18th February, 2000 In H.C.C.C. NO. 2533 OF 1997)

RULING OF AKIWUMI, J.A.

I have had the advantage of reading the Ruling of Shah JA and do not find it necessary to recount the background of the present appeal which has been adequately set out in his Ruling. I will content myself with the following additional observations.

One of the well established propositions which must be satisfied if the Applicants are to be granted the injunction which they now seek, is that their intended appeal if successful would be rendered nugatory, if the threatened sale of their property, is not stayed. Indeed, in the Applicant's notice of motion in this regard dated 15th June, 2000, this ground is set out as follows:

"The Appeal would become nugatory if the suit property is sold off in the meantime."

In the supporting affidavit to the notice of motion sworn by **the first Applicant, all that he depones with respect to this ground is as follows:**

"THAT I verily believe that the Appeal will become nugatory if the suit property is sold off in the meantime, and any orders of the Court of Appeal would be made ineffective."

I am afraid that this sort of feeble and insubstantial averment on oath is not good enough. If anything, it demonstrates the Applicants' lack of any just reasons why the Respondent should be denied its right to enjoy the fruits of its success in the superior court. This position was in my view, not altered much by the relevant submissions made by counsel for the Applicant. What he said was that if the suit property is sold, the appeal would be rendered nugatory as it will not be possible to retrieve the property, notwithstanding the fact that the Respondent is a bank. But satisfactory pecuniary compensation can be awarded and as this court has had occasion to observe, land is no

longer a "sacred cow".

My Lord Shah, has expounded sufficiently on the other proposition which must also be satisfied by the Applicants, before the injunction sought by them can be granted, namely, that their intended appeal is an arguable one. I would, however, like to make a few additional observations on this point. In my view, the learned Judge of the superior court on the basis of the facts before him, was right in holding that the Applicants had been less than candid when it was asserted, even though they had certified that sections 69(1) and 100A of the Transfer of Property Act 1882 of India as amended by the Indian Transfer of Property Act

2 (Amendment) Act 1959, had in respect of the charge which they had executed, been explained them, that this had in fact, not been done as certified by Harit Sheth the Advocate who had drawn up the charge. But indeed, who else, as the Applicants had certified, had or could have explained these statutory provisions to them if it had not been Harit Sheth. The Applicants went to the superior court seeking as they did, an equitable relief with dirty hands.

They have come to this Court with the same dirty hands which alone, bars them from the granting of the equitable relief of injunction that they now seek.

As regards the law, I bear in mind that one should not usurp the role of the bench of this Court that would hear the intended appeal if it is brought, but I am constrained in the particular circumstances of the present application, to be as emphatic as necessary. I must say that I did not only, enjoy reading the Ruling of the learned Judge of the superior court, but also, agree with his exposition of the law concerning the effect of section 73 of the Evidence Act and the authorities that he considered to the effect that the charge was properly executed by the Applicants.

And lastly, according to Halsburys Laws of England, Fourth Edition, Vol. 32 para 725:

"The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has began redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court."

In the result, since Shah, JA agrees that the Applicants'

3 application be dismissed, it is hereby dismissed with costs. It is so ordered.

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

A. M. AKIWUMI

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JUDGE OF APPEAL