



REPUBLIC OF KENYA
IN THE COURTS OF APPEAL
AT NAIROBI

CIVIL
APPLIC 165 OF
2000 (73/2000
UR)

1. LALCHAND
FULCHAND SHAH)

2. RAMBHABEN LALCHAND SHAH) APPLICANTS

AND

INVESTMENTS & MORTGAGES BANK LIMITED..... RESPONDENT

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

RULING OF OWUOR J.A

I have had the advantage of reading in draft the rulings of my brothers AKIWUMI and SHAH, J.J.A. On my part, the application for an injunction under rule 5(2) (b) is irresistible.

Counsel for the applicant, Mr. Nowrojee, submitted that several serious issues will arise in the intended appeal. One of these arises out of the averment by the applicants in the superior court that the applicants had not executed the charge before the advocate named in the document or before any advocate, and that neither the said advocate nor any other advocate had explained the effect of the charge to them as required by the Transfer of Property Act of India as amended by the Indian Transfer of Property

Act (Amendment Act 1959). In support of this the first applicant had sworn an affidavit setting out these matters. There was no evidence to the contrary from the advocate concerned or the respondent. The onus of proof is upon the person who asserts. Upon placing their affidavit evidence before the superior court on the matter, it would appear to me that the applicant discharged this onus, prima facie. To my mind it is not a frivolous issue. It clearly raises the issue of the validity of the charge.

It was also argued by the applicants that the respondent had demanded several different sums of money. The charge was to secure sums up to KSh.30 million. The notifications of sale, both earlier

and presently, state that the sum due was KSh.145 million. While the property had been valued at KSh.20 million, yet the charge was stated to cover advances in excess of that amount. The applicants' argument is that the demand must be an ascertainable amount and that the chargors were entitled to have the amount established before any power of sale could be exercised. The documents show these varying figures and whatever view the court ultimately takes on the matter in the intended appeal, to my mind this is not a frivolous issue.

As regards the issue of whether the appeal would be rendered nugatory if an injunction is not granted, I am satisfied that would be the inevitable consequence. The property would be sold and the applicants would have lost it forever.

2 For the reasons I have given above, I would allow the application and grant the injunction sought. I would order the costs of this application be costs in the appeal.

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

E. 0WU0R

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR