IN THE SUPREME COURT OF NIGERIA

Suit No: SC278/2001

Petitioner: Olori Motors Company Ltd & 2 Ors
And
Respondent: Union Bank of Nig Plc

Date Delivered: 2006-04-06

Judge(s): Idris Legbo Kutigi , Aloysius Iyorgyer Katsina-Alu , Ignatius Chukwudi Pats-Acholonu , George Adesola Oguntade ,

Judgment Delivered

The facts will be stated briefly. Judgment was entered in favour of the Plaintiff against the Defendants in the sum of N7, 949,273.00 and N84, 710.00 with interest by the Benin High Court. The Defendants without delay filed a Notice of Appeal simultaneously with a motion for stay of execution. The Plaintiff was never served. Meanwhile the Plaintiff levied execution by selling some of the Defendants\' mortgaged properties. On becoming aware of the development, the Defendants applied to the High Court to set aside the execution. The application was granted and the execution was set aside. Dissatisfied with the Ruling setting aside the execution, the Plaintiff appealed to the Court of Appeal which allowed the appeal and dismissed Defendants\' application to set aside the execution. The Defendants have now appealed to this Court against the decision of the Court of Appeal.

The Defendants/Appellants on page 2, paragraph 1.4 of their brief of argument in support of their appeal have stated as follows -

\"This present appeal is against the decision of the Court of Appeal. It is worthy of note that the Court of Appeal has subsequently allowed the appeal against the judgment of the trial Court in the substantive suit.\"

(Emphasis mine)

It is clear to me therefore that this appeal is now lifeless, spent, academic, speculative and hypothetical, being an interlocutory appeal only, while the substantive suit or appeal itself has been disposed of and or completed (See for example Olale v. Ekwelendu (1989) 4 N.W.L.R. (PT. 115) 326, Union Bank of Nigeria v. Alhaja Bisi Qdionser (1985) 2 N.W.L.R. (PT. 74) 193. It must be emphasized here now that this Court does not issue opinions about potential cases. The Court hears appeals or cases that present actual threat to individual rights. A case must present a current problem that has yet to be resolved. It must be stressed also that a party bringing a case must have a vested interest in the issues raised and in its outcome. This appeal has failed all the tests. The Defendants/Appellants and or their Counsel should have taken steps to withdraw this appeal before now. They failed to do so. I am of the firm view that this appeal must fail on this ground as this Court is without jurisdiction. There is therefore no need for me to consider the issues raised in the appeal. It must in the circumstances therefore be struck-out, and I so order.

The appeal is struck-out. The Plaintiff/Respondent is entitled to his cost which is assessed at N10, 000.00 against the Defendants/Appellants.

Judgment delivered by
Aloysius Iyorgyer Katsina-Alu. J.S.C.

On 4 February 1994, judgment was entered in favour of the Plaintiff against the Defendants in the sum of N7, 9949.273.00 and N84, 710.00 with interest by the Benin High Court. Dissatisfied, the Defendants on 4 February 1994 filed a Notice of Appeal simultaneously with a motion for stay of execution. The Defen'dants paid for service. The

Plaintiff was however not served.

In the meantime the Plaintiff levied execution by selling some of the Defendants\' mortgaged property. Upon becoming aware of this development, the Defendants applied to the High Court to set aside the execution. The High Court granted the application and the execution was set aside. The Plaintiffs appeal to the Court of Appeal was allowed and the Defendants\' application to set aside the execution was dismissed. Subsequently, the Court of Appeal allowed the appeal against the judgment of the trial court in the substantive suit.

The Court of Appeal, as can be seen, has created two situations here which run parallel. The first decision of that court relates to the motion to set aside the sale of the mortgaged property by the Plaintiff. The Court of Appeal dismissed the motion to set aside the sale brought by the Defendants. The effect of this is that the Plain'tiff was right to sell the Defendants\' property in question.

The second decision by the Court of Appeal relates to the substantive suit. The judgment of the trial High Court in the substantive action concludes as follows:

\"Judgment is entered for the plaintiff in the sum of N7,947,273 as being the balance outstanding on the current account and loan account of the 1st defendant company as at 23rd August 1988 and which were guaranteed by 2nd defendant and 3rd defendant. Interest will be payable on these amounts at the rate of 21% per annum from 28th August 1988 until today\'s date and at the rate of 5% thereafter until the judgment debt is fully liquidated.

Subject to any necessary consent being obtained the Plaintiff is at liberty to sell the properties mortgaged by the defendants as securities for the various facilities granted by the plaintiff.\"

The defendants appeal to the Court of Appeal, as I have already indicated, was allowed. This means that the Plaintiff was not at liberty and had no right to sell the Mortgaged properties.

The trial High Court wittingly or unwittingly put the mortgaged property in dispute. Now in my view the judgment of the Court of Appeal allowing the defendants\' appeal in the substantive action has not laid to rest the sale of the property in question by the Plaintiff. It must be borne in mind that the properties were sold after the judgment of the trial court in the substantive action. In other words it was not a subject for determination in the substantive suit. So that the appeal did not dispose of the issue of the sale of the mortgaged property during the pendency of that appeal.

The next point is whether the issue of the sale of the property is hypothetical or academic. I think not. The issue of the sale of the property is a live issue. It was the subject matter of a different action brought by way of a motion to set aside the sale.

The question I have to resolve now is whether the Court of Appeal was right when it dismissed the application to set aside the sale of the Defendants\' property during the pendency of the appeal against the decision of the lower court and a motion for stay of execution of the said judgment.

So what is the doctrine of lis pendens and how does it operate. The doctrine of lis pendens prevents the effective transfer of rights in any property which is the subject matter of an action pending in court. In its application, the doctrine is not founded on the equitable doctrine of notice-actual or constructive. It is based on the principle that the law does not allow to litigant parties or give to them during the currency of the litigation involving any property, rights in such property in dispute so as to prejudice any of the litigating parties. See Ogundaini v. Araba & Anor (1978) 6-7 SC 42. This is good law. For it would be plainly impossible that any action or suit could be brought to a successful termination if alienations pendente lite were allowed to prevail.

One more point. It has been said that the Plaintiff resorted to its power of sale under the mortgage and sold two of the Defendants\' properties without going back to court. My short answer to that is simple. When the Plaintiff elected to go to court, it waived its power of sale under the mortgage.

In the circumstances I would allow this appeal and set aside the judgment of the Court of Appeal and restore the ruling of the trial court on 31 March 1995. I award costs of N10, 000.00 to the Defendants/Appellants.

Judgment delivered by
Ignatius Chukwudi Pats-Acholonu. J.S.C.

The appeal in this case revolves around an issue of law. But it is desirable and I dare say essential to give the synopsis of the facts giving rise to the appeal. The Plaintiff who is now the Respondent in this appeal obtained judgment of the High Court in the sum of N7,947,373.00 and another N84,710.00 odd being a further outstanding balance in the current account at the interest of 21% from 28th August, 1988 till the date of that Judgment, and further 5% until the whole sum was liquidated. It is the case of the Appellants that on the same date of the judgment the defendants now the Appellants filed a notice of appeal and followed it up with filing a motion for say of execution. I must have to say here that the case arose from the alleged inability of the Appellants to redeem his mortgaged property under the deed of a legal mortgage.

The story of the Appellants was that after judgment was delivered which necessitated the Appellants taking further steps such as filing an appeal and a stay of execution to have the judgment of the High Court reversed by the Court of Appeal, the Respondent went ahead and sold the mortgaged property. The case of the Respondent is that after the judgment of the High Court, without it in the least knowing that the Appellants had filed some processes in the Court to have the judgment of the High Court set aside it had as judgment creditor executed the judgment of the High Court on the 15th of April, 1994.

Let me here digress a little and dwell tritely on some missing links. No date as it turned out was fixed for hearing of the motion for stay by the trial Judge before her retirement. Meanwhile of course execution had been levied. I have to state that by my calculation; from the date of the judgment to the actual date of sale was exactly 70 days. The Appellant applied to the High Court now presided over by another Judge to set aside the sale. The High court agreed and set aside the sale holding that the motion for stay of execution hitherto filed in the High Court has on the decision of Vaswani Trading Company v. Savalakh and Company (1972) 12 SC at P. 77 acted as a temporary restraining order.

As a matter of fact that property was sold by auction, the Respondent not relying squarely on the judgment of the Court by which the Appellants became judgment debtors. The High Court had held inter alia, that though the Respondent was not served with the processes, the Court was of the opinion that since the processes were filed early enough, the Respondents should be deemed and/or presumed to know about such filings, and, further holding that the Respondent acted recklessly and in utter bad faith.

On appeal to the Court of Appeal by the Respondent, that Court reversing the judgment of the High Court held:

'(a) that the sale was made under the mortgage deed not under the judgment of the court.

(b) that it was wrong for the High Court to have imputed knowledge of the new processes filed in the Court without the benefit of the Respondent knowing about it and

(c) it blamed the Appellants for lack of diligence and thereupon allowed the Appeal'.

The Appellant having appealed to this Court stated that the bottom line of this case is \"whether the sale was in exercise of the power of sale under the deed of mortgage or not the fact remains that the mortgage property is the subject of the suit pending in the Court of appeal\".

In other words the scenario that presented itself before the Court was a case of lis alibi pendens. What lis pendens'. In vol. 54 page 570 of Corpus Juris Secundum which is the American Re-statement of the Law, the learned authors relying on numerous cases define the scope of this doctrine of Lis Pendens as follows:-

'It denotes those principles and rules of law which define and limit the operation of the common law maxim, to the effect that nothing relating to the subject matter of a suit can be changed while it is pending; and, subject to certain limitations and qualifications considered infra one who, with actual or constructive notice of the pending action, acquires from a party thereto an interest in the property involved in a litigation in a court having jurisdiction of the subject matter and of the person of the one from whom the interest is acquired, takes subject to the rights of the parties to the litigation as finally determined by the judgment or decree.\"

See People ex rel O\' Connor v. City of Chicago 20 NE. 2d 306, Massachusetts Bonding and Insurance Co. v. Knox 18 SE 2d 436, Mitchell v. Federal Land Bank of St. Louis 174 S.W. 2d 671 at 675. First Bank of Eureka Spring v. Cook go S.W. 2d 510.

There have been opinions to the effect that regardless of either implied notice or constructive notice since the doctrine is based empirically on public policy, that if a person acquires a property still a subject matter of court proceedings, he acquires only subject to the right of whoever becomes the victorious party. In considering the extent of the application of lis alibi pendens, the courts must be careful not to overly extend its application too wide as it could lead to all manner of problems and perhaps injustice for there must be an end to litigation. It will in my view not be quite in accord with prudence and even in the interest of public policy that an action cannot be regarded as having come to an end after the delivery of a judgment and when a party executing the judgment of the Court by way of sale commences such a sale more than 2 months after the determination of the action completely ignorant of any processes filed and yet be caught by the operation of this doctrine.

I believe that it accords with good sense that the losing party who after filing an appeal and also an application for stay of execution immediately the judgment was given should hasten to notify or inform in one way or the other the victorious party of his intention to pursue the case further. The doctrine of Lis alibi pendens should be understood to be a philosophical tenet which takes into consideration the realities of human society and the nature of the mobility of a vibrant society. Its application must reflect the times. For one to file a process in the court and abandons it for some months with same not being brought to the knowledge of the other party, in my opinion, should not in all fairness be allowed to invoke the doctrine of lis pendens. The common law or as we may say (jus commune) had its foundation on reasonableness of certain empirical elements. In its historic and organic form it avoids and detests abstractions or concepts that remove it from what it has become after the adventure of the Saxons in England by which time what we now regard as \"Corpus juris angliae\" manifested itself in a form that recommends itself in simple and readily understandable rules. From historical perspective the origin of the common law seemed to be traceable to first the culture of Germanic tribesmen who by their Saxon\'s conquest of England revamped that country\'s culture. They borrowed nothing from the Roman law or from any nation. They knew nothing of Greek or of Rome except that the Pope who was the head of the Church was said to live there. This situation was further embellished and I would add refined after the Norman Conquest in 1086 by William the Conqueror. By fashioning for themselves domestically grown or brewed laws they equally evolved certain principles and doctrines as times went by to help build a body of laws based on common sense, custom and reality of the day. Such doctrine as lis alibi pendens is one of such principles to deal with legal problems arising. Therefore the doctrines and principles which were developed to help us understand the nature of law and its applicability in relation to finding remedies should necessarily follow the development of the society as no society is static and doctrines relied on to remedy a wrong while seemingly immutable ought to be applied flexibly to reflect the growth and necessary bent of the society.

The expression lis pendens variously interpreted in different forms means a pending action or suit or a controversy in court particularly in relation to the subject matter of a property. There is implicit in the doctrine of lis pendens that a buyer who purchases a property still subject of a determination of the Court has bought for himself a big trouble as the outcome can be against the vendor.

It is really difficult for me to understand and effectively and duly appreciate an argument to the effect that if a process is filed in respect of an action, or to be more appropriate and factual, if such processes as filed after a judgment such as a stay of an execution on a matter subject of an appeal and for a period of 70 days such notices of stay and appeal were not brought to the notice of the judgment creditor, that he should be imputed to have known that such processes had been filed. It is in my respectful view an awkward thinking that fits only in the realm metaphysics. I would have thought

that the party, who stands to lose if matters are not diligently handled, should have striven to ensure that all processes duly filed are served on the other party. Indeed it cannot be otherwise stated that in a matter of this nature, prudence dictates that the party to be effected adversely if nothing is done should have endeavoured to cause service to be made by going to the registry to alert them. It is no point waving the decision of this court in Vaswani Trading Co. v. Savalakh Supra as though it is a magic wand which possesses great powers and can solve all problems when the facts are not the same. Consider the following for example. In Vaswani Trading Co. v. Savalakh Supra the Supreme Court took time to state the following

\"We are satisfied that in this case the respondents were aware that a motion was pending before this Court for a stay of execution\".

(The italics is mine)

The unmentioned conclusion is that if the Respondents in that case had not known of the motion, the situation would have been different.

It is to my mind a twisted and oblique thinking to draw a conclusion that if a process is filed which is not to the notice of the other party for whom it is intended and he goes about his business totally ignorant of what might have taken place then he should be punished for it.

I cannot but help endorsing without any unequivocation and agreeing with the view expressed by Uwaifo JCA(as he then was) when he said in the case of Pavex Int. Co. Ltd v. I.B.W.A. (1994) 5 N.W.L.R. (Pt. 347) 685 at 696.

\"I think in matter like this where it is sought to show that execution of judgment took place while an application for stay of execution had already been brought, the argument must be that in spite of that application, the execution creditor went ahead with the execution'.

In my respectful view the argument cannot be tenable without clear evidence that the execution creditor was aware as a fact of the pendency of that application in order to give the desired effect to the admonition in Vaswani Trading Co. v. Savalakh (1972) 1 All N.L.R. (Pt. 2) 483 at 490 where the Supreme Court said inter alia:

\" We are satisfied that in this case the Respondents were aware that a motion was pending before this Court for a stay of execution duly filed in accordance with law at a time when the Respondents might not proceed to execution\"

With due respect, I cannot find myself agreeing or endorsing the rather common place and seemingly pedestrian argument of the Appellants on this point. Generally the Court is disposed to assist a person who is awake and not the indolent.

On another level, there was indeed a deed of mortgage on which the Respondent based its sale. In other words it exercised another option open to it to secure the financial benefit due to it. Shall we blame the Respondent when it resorted to exercising the option of sale through the covenant or stipulation in the deed.

To sum up there is no way I can reverse the judgment of the Court of Appeal from the facts and the applicable law available. In the circumstances I agree with the lead judgment of my learned and noble Lord Kutigi JSC, of which I have had the benefit of having read in draft. I allow the appeal and abide by the orders in the lead judgment.

Judgement delivered by
George Adesola Oguntade. J.S.C.

This appeal brings to the fore the ambit of the doctrine of lis pendens. The respondent, as the plaintiff at the Benin High Court, had sued the appellant, as the defendant claiming the sum of Eight million, thirty-one thousand, nine hundred and

eighty three Naira (N18,031,988.00) being the balance due on overdraft and loan facilities (including interest) granted by the plaintiff to the defendant. It is important to add that the plaintiff had also sought an order of court empowering the plaintiff to sell the properties mortgaged to it by the defendant to secure the loan facilities.

On 4-2-94, Aiwerioghene J. gave judgment in favour of the plaintiff. The judgment was concluded in these words:

\"Judgment is entered for the plaintiff in the sum of N7,947,273.00 and N84,710.00, being the balance outstanding on the current account and loan account of the 1st defendant company as at 23rd August, 1988 and which were guaranteed by the 2nd defendant and 3rd defendant. Interest will be payable on these amounts at the rate of 21% per annum from 28th August 1988 until today\'s date and at the rate of 5% thereafter until the judgment debt is fully liquidated.

Subject to any necessary consent being obtained, the plaintiff is at liberty to sell the properties mortgaged by the defendants as securities for the various facilities granted by the plaintiff.

[Underlining mine]

The counter-claimed is dismissed\"

On 31-5-94, the 1st and 2nd defendants by their counsel filed an application praying

\"(a) An order setting aside the execution by way of a purported sale of the judgment (sic) of this Honourable Court dated the 4th of February, 1994.

(b) And for such further or other orders as this Honourable Court may deem fit to make in the circumstances.\"

In the affidavit in support of the application it was deposed thus:

\"2. Judgment was given in this case on the 4th day of February, 1994. That same day the 1st and 2nd Defendants filed a notice of appeal against the judgment and a motion for stay of execution of the said judgment, both of which are in the court\'s file. The 1st and 2nd defendants also paid for service.

3. By their counter affidavit dated the 17th day of May, 1994 and filed in respect of the application for injunction dated 18/4/94 the plaintiff avers that in execution of the judgment dated the 4/2/94 they have sold 2 of the mortgaged properties. The sale was purportedly made during the pendency of the application for stay of execution and was aimed at foisting a fait a compli on the court. The Governor\'s consent was neither sought nor obtained before the purported sale.\"

The plaintiff, in reaction to the affidavit of the 1st and 2nd defendants deposed to a counter-affidavit. Paragraphs 3 to 8 of the said counter-affidavit read thus:

\"3. That the Plaintiff/Respondent Bank sued the Defendant/Applicants in 1988 and judgment was delivered in favour of the Plaintiff/Respondent on 4/2/94.

4. That as soon as the Plaintiff/Respondent obtained judgment on 4/2/94 it wrote letters dated 7th February 1994 applying for consent to sell the mortgage properties of Messrs Olori Motors and Company Ltd., and delivered same to the Ministry of Lands on 7/2/94.

5. The Plaintiff/Respondent also paid the prescribed fees to the Ministry of Lands and obtained official receipts from the Ministry. The Plaintiff/ Respondents\' letters with receipts dated 7th February 1994 issued by the Ministry of Lands now shown to me are attached and marked as Exhibit A - A3 and B - B3 respectively.

6. That thereafter the Plaintiff/Respondent proceeded to authorise its auctioneers to advertise the sale of the

properties enumerated in the applications and the receipts.

7. That the Plaintiff/Respondent has explained the true position of things in its counter-affidavit dated 17/5/94 and filed in respect of the application for injunction dated 18/4/94 before this Honourable Court on 17/5/94.

8. That the Notice of Appeal against the judgment and motion for stay of execution of the said judgment both of which are in the court\' file, were not served on the Plaintiff/Respondent nor its counsel till 17/5/94 in this Honourable Court long after the sale of the 2 mortgaged properties.\"

[Underlining mine]

It is manifest from the extracts of the affidavit and counter-affidavit reproduced above that -

(1) The plaintiff had filed a notice of appeal on 4-2-94, the same date the judgment was given.

(2) The plaintiff had also filed on the same date a motion for stay of execution of the terms of the judgment given on 4-2-94.

(3) The defendant had not been served the Notice of Appeal and the Motion for stay of execution until 17-5-94 although the two processes were by common agreement in the court file.

The application to set aside the execution levied by the plaintiff was heard by Idahosa. J., who on 31-03-95 delivered his ruling thereupon. The learned Judge in his ruling said at pages 32-33 -

\"In the instant case, judgment was delivered on 4th February, 1994. On the same day, the 1st Defendant /Applicant filed a Notice of Appeal and also filed a Motion for Stay of Execution. The 2nd Defendant/ Applicant did not file any Motion for stay of execution.

From the judgment, I have seen that the Court gave the Plaintiff authority, subject to any necessary consent being obtained \'to sell the properties mortgaged by the Defendants as securities for the various facilities granted by the Plaintiff.

It is, perhaps, for this reason that Plaintiff did not bother to file an application for a writ of fife. This is where in my view the action of the plaintiff overtook the application filed by 1st defendant for a stay of execution, and it explains why the sale was not stopped by the Court Registrars when a Motion for stay had been filed as Plaintiff used the services of an auctioneer.

In spite of this particular situation, I am of the firm view, that the Plaintiff having taken upon itself the responsibility of conducting the sale by its agent, ought to have kept in close touch with the Court Registrar for any information as to any development by way of an appeal or an application for a stay of execution. In this case, the Plaintiff will be deemed to have known about the Motion as it was timeously filed through the Deputy Sheriff of the Court who is deemed to have known about it, and he is taken as the agent of the Plaintiff for execution purposes. See Order 2 Rule 29 of the Judgment Enforcement Rules and page 85 of the Report in the case of Vaswani v Savalkh (supra)

It is also my view that Plaintiff acted recklessly by not making inquiries from the court before carrying out the sale as it had taken the sale (which would ordinarily have been conducted by a Court Bailiff) from the Court. It was therefore its duty to ensure that there was no procedural hindrance to any sale. This is why I decline to agree with learned counsel for Plaintiff that the sale was made in good faith.

In the case of Vaswani v. Savalakh (supra) and the case of Sanni v. Otesanya cited at page 80 of the Report of Vaswani's case, the Supreme Court set aside a writ of possession already executed and returned the parties to the original status quo, pending the determi'nation of the Motion for Stay of Execution. The situation in this instant application is similar to that in Vaswani's case.

The sale which had been carried out by the Plaintiff and its agents cannot be allowed to stand, in view of the fact that was made while a Motion for Stay of Execution regularly filed had not been resolved. In the words of G.B.A. Coker, JSC.-

\'More important, however, is the duty of this Court, as indeed that of other Courts, to ensure that its orders are not nugatory\'.

See page 85 of the case of Vaswani\'s report.

In view of all that I have said, I will make the following order i.e. the sale carried out by the Plaintiff or its agents on the 15th day of April, 1994 is hereby set aside pending the hearing and determination of the Motion for a stay of execution by the 1st Defendant on 4/2/94. Plaintiff shall pay N25.00 to 1st Defendant as costs.\"

[Underlining mine]

The plaintiff was dissatisfied with the ruling of Idahosa J. It brought an appeal against it before the Court of Appeal, Benin Division (i.e. the court below). The court below on 23-4-98, in a unanimous judgment allowed the appeal and set aside the ruling of the High Court. The court below anchored its reasoning on the fact that the plaintiff had not been served the Notice of Appeal and the motion for stay of execution. The plaintiff, the court below said, could not therefore be said to have acted in the abuse of the processes of court. At pages 72-73 of the record, the court below said:

\"In the present case however, in the absence of proof of service or even the Notice of Appeal on the appellant not to talk of the service of the motion for stay of execution itself, the appellant and the lower court cannot be accused of any abuse of the process of court on the account of the appellant\'s exercise of its powers of sale under the mortgage deed without having recourse to the execution of the judgment through the processes of the trial court. The circumstances surrounding the failure of the respondents to bring to the notice of the appellant of the application for stay of execution pending in the High Court as contained in the affidavit in support of the application are quite unfortunate because the delay was brought about by the retirement of the learned trial judge after delivering her judgment in favour of the appellant on 4/2/94 and the difficulties experienced by the respondents in getting the motion re-assigned to another Judge for fixing a date for hearing. It is my view that the appellant cannot be blamed for all these unfortunate events that caused delay in serving the motion for stay on the appellant to justify terming its conduct in selling the mortgaged properties as an abuse of court process because if the respondents had exercised a little more diligence, they could have served the appellant with at least the notice and grounds of appeal already filed within time to put the appellant on notice of the pending appeal before the motion for stay of execution could have become ready for service. If this step had been taken by the respondents, the situation in the present case would have been different. Therefore having regard to all I have said in the resolution of the lone issue for determi'nation in this appeal, I am of the view that the lower court applied the decision of the Supreme Court in the case of Vaswani & Co. V. Savalakh & Co. (Supra) wrongly in setting aside the sale of the respondents\' mortgaged properties which was carried out while their application for stay of execution of the judgment was pending before the lower court. In any case the relief sought by the respondents in their application as earlier quoted in this judgment is not even pending appeal but for an indefinite period.

In the result, this appeal Succeeds and It Is Hereby Allowed. The Ruling of the lower court of 31/3/95 setting aside the sale of the respondents\' mortgaged properties is Hereby Set Aside. In its place, an Order dismissing the respondents\' application is hereby made.\"

The 1st and 2nd defendants were dissatisfied with the judgment of the court below. They have brought this final appeal against it. In their appellants\' brief, one issue was identified as arising for determination in the appeal. The issue reads:

\"Whether the lower court was right when it dismissed the appellant\'s application to set aside the sale of the appellants\' mortgaged property during the pendency of the appeal against the decision of the lower court and a motion for stay of execution of the said judgment.\"

Appellants\' counsel has argued that the doctrine of lis pendens prevents the effective transfer of right in any property which is the subject-matter of an action pending in court - Dan Jumbo v. Dan Jumbo [1997] 11 NWLR (Part 627)445; Alakija v. Abdulai [1998] 6 NWLR (Part 522)1 at 17.

It was submitted that lower court was wrong in validating the sale of the mortgaged property during the pendency of the Motion for stay of Execution and a valid appeal against the judgment of the High Court. Counsel further argued that whether the sale was an exercise of the power of sale under a mortgage deed or not, the fact remained that a suit was pending in the Court of Appeal by force of the Notice of Appeal filed. Finally, counsel said that with a bit of diligence, by conducting appropriate searches in the court\'s records, the defendant would have known of the pendency of both the Notice of Appeal and the Motion for Stay of Execution. Counsel referred to Vaswani Trading Co. v. Savalakh & Co. [1972] 12 SC.77.

The respondent\'s counsel, in his brief, took the same position as the court below did, that since there was no evidence, that the Notice of Appeal and the Motion for Stay of execution had been served on the plaintiff at the time the defendant\'s properties were sold, the principle in Vaswani Trading & Co. v. Savalakh & Co. (supra) would not apply.

Counsel relied on Pavex Int. Co. Ltd. V. I.E. W.A. [1994]5 N. W.L.R. (Pt. 347)685 at 696. It was submitted that the plaintiff had not been shown to have acted in bad faith. Counsel submitted that, there was a distinction between the exercise of a power of sale derived under a mortgage deed and the exercise of a power of sale following a court judgment.

Counsel also raised objection to the appellants\' ground of appeal No. I(b), contending that the issue of lis pendens, was not raised before the two courts below, and that the same could not be raised before this Court without leave being sought and obtained.

My reaction to the objection by defendant\'s counsel is that the same is without a valid basis. Whilst it is true that parties had not used the Latin words \'lis pendens\' in their arguments before the two courts below, it is obvious that the case had been all about whether or not there was power in the defendant to sell the mortgaged properties of the plaintiff at the time when a suit concerning same was before the Court of Appeal. \'lis pendens\' simply means \'a pending suit\'. It is beyond argument therefore that the parties had been locked in a dispute about the applicability of \'lis pendens\', even if they had not employed the Latin words in their disputations before the two courts below.

There was also the argument by defendant\'s counsel that a distinction existed between the sale of property under a deed of mortgage, and a sale done under the terms of a court judgment. The court below also expressed the same view. I think that this argument overlooks the fact that the plaintiff in its claim had prayed the court for an order empowering it to sell the properties mortgaged to it by the defendant to secure the loan facilities. The trial court in its judgment granted the order. It is therefore inappropriate to argue that the plaintiff sold the properties, pursuant to power derived under a mortgage deed as it is clear for all to see that the order to sell the properties, subject to certain consents being obtained was made by the trial court.

The central issue in this appeal is whether or not the fact that the Notice of appeal and the motion for stay of execution had not been served on the plaintiff prevents the doctrine of lis pendens applying to the sale of the properties which the defendant mortgaged to the plaintiff. It is beyond argument that the mortgaged properties had been in dispute before the trial court. It is also not in dispute that if the Notice of appeal and the motion for stay of execution had been served on the plaintiff, the court would have set aside the sale effected by the plaintiff in line with the decision in Vaswani Trading Co. v. Savalakh Co. [1972] 12 S.C. So, does non-service of the relevant processes on plaintiff make all the difference' In answering this question, it is important to bear in mind the nature of the doctrine of lis pendens and how it operates.

In Adaran Ogundaini v. O. A. L. Araba & Anor. [1978] 6-7 S.C. 42 at pp. 56-57, this Court per Idigbe JSC discussed \'lis pendens\' thus:

\"The doctrine of lis pendens prevents the effective transfer of rights in any property which is the subject matter of an action pending in court during the pendency in court of an action. In its application against any purchaser of such

property the doctrine is not founded on the equitable doctrine of notice - actual or constructive - but upon the fact that the law does not allow to litigant parties or give to them, during the currency of the litiga'tion involving any property, rights in such property, (i.e. the property in dispute), so as to prejudice any of the litigating parties. As was stated in Bellamy v. Sabine (1857) 26 LJ (NS) Equity Reports 797 at 803:

[Underlining mine]

\'It is ...... a doctrine common to the courts of both law and equity, and rest .... upon this foundation, that it would be plainly impossible that any action or suit could be brought to a successful termination if alienations pendants lite were permitted to prevail ....\'

(per Turner, L.J., in Bellamy v. Sabine)

and as was said by Lord Coke (usually regarded as one of the greatest exponents of the \' Common Law\') pendente lite nihil innovetur. In Sorrell v. Carpenter (1728) 2 P. Wms, 482, the plaintiff instituted an action against Ligo, upon a claim which the decree established to certain leasehold estates. Pending the suit, Ligo sold the property involved to Carpenter. The question was whether Carpenter qua purchaser could sustain his purchase.

Although upon some formal ground the bill in that case was dismissed, Lord King (Lord Chancellor) was unequivocal in his view that Carpenter could not sustain his purchase. A very important aspect of this doctrine which is Germaine to the facts in this case is reflected in the head note in Sorrell (Supra) and it reads:-

\'A purchase pendente lite though without actual notice and for valuable consideration, yet shall be set aside ..... but as it is hard enough in some cases to make people take notice of a decree, it is harder still to oblige them to take notice of a pendency of a suit; and in case of a real purchase pen dente lite, the plaintiff is to be held to strict proof. And if any flaw at the hearing be on the plaintiffs side, the court will not let him amend, but if the purchase pendente lite be fraudulent, and to elude the justice of the court, it ought to be highly discountenanced.\'

Now, applying the doctrine of lis pendens to the facts in the case in hand what do we find' The following salient facts emerge:

(1) Ashiru, sells the property 46 Akpata Street, Shomolu, Lagos - the subject, matter of a court action and during the pendency of the said action - to the appellant in circumstances, undoubtedly, fraudulent.

(2) The sale was undoubtedly made during the pendency of the action because at the time of the sale the decision of Oyemaje, J., was being prosecuted by both the ligating parties who each appealed from the judgment; and an appeal is in law a continuation of the prosecution of the original cause or matter which is the subject of the appeal (see also Kinsman v. Kinsman (1831) 1 Russ & M. 617; also 39 ER 236)

(3) What was pending before Oyemade, J., whose decision was on appeal to the Supreme Court at the time of the sale of the disputed property by Ashiru to the appellant, was the claim of the Bank for specific performance by Ashiru of his obligation under the Memorandum of Deposit of title Deeds to convey to the bank the same legal estate in the disputed property, later purportedly conveyed to the appellant.\"

See also John A. Osagie v. S. O. Oyeyinka & Anor. (1987) 3 N. W.L.R. (Pt.59) 144 at 155.

Now in Dan Jumbo v. Dan Jumbo (1999) 11 NWLR (Pt.627) 445, this Court had to consider the validity of a grant of probate made at a time an appeal was pending on a case concerning the administration of the will of a deceased. Relying on the doctrine of lis pendens, the High Court and the Court of Appeal set aside the grant made while an appeal was pending. This Court, per Wali JSC at page 456 distinctly agreed with the views of Kolawole J.C.A. thus:

\"In the circumstances of this case, I agree with Kolawole JCA in the lead judgment when he opined thus:

'The fifth appellant/defendant did not take the appropriate steps which he should have taken after the entry of caveat by the res'pondent'.

The fifth appellant, in my view ought to have issued a notice to appear against the caveator, respondent, on behalf of the first to fourth appellants whose appli'cation for a grant had been stopped as the fifth appellant clearly admitted in paragraph 7 of his statement of defence thus:

\'That as a result of the caveat filed by the plaintiff the 5th defendant was estopped from the grant of probate.\'

In my view, the fifth appellant was not entitled to grant probate to the other four appellants after the conclusion of the case by Allagoa J. on 10th April, 1972 when an appeal had been lodged against the judgment. There was no necessity to apply for a stay of execution as the lis was still pending and the Will was still in litigation. The position was admirably put at page 1147 of the Lord Trimlestown case by Sir John Nicholl thus -

'The taking of an administration with a Will annexed, which Will was in litigation, is, at least, prac'ticing a deception upon the Court..... The administration too was obtained, after knowledge that caveat had been entered which was never warned, and that caveat having expired, this admini'stration was taken without giving any notice to the other party. At least then it was obtained, to use a tender expression, irregularly.....'

On the issue of lis pendens. The learned Justice commented and concluded as follows-

'True, so many years have elapsed since the filing of the appeal in PHC/49/71 and the institution of action in this appeal on 21st May, 1979 in suit number PHC/137/79 but that appeal has not been determined on its merit and neither has it been terminated on the application of the respondents to the appeal. On that basis, there is lis pendens and the principle is that the law does not allow to the litigant parties or give to them during the currency of the litigation involving any property rights in such property so as to prejudice any of the litigating parties'.

(See Ogundaini v. Araba & Barclays Bank of Nigeria Ltd. (1978) 6/7/SC.55 P. 78. John A. Osagie v. S. O. Oyeyinka & Anor. (1987) 3 NWLR (Part 59) P. 144 at P. 155. Steven Omo Ebueku v. Sunmola Amola (1988) 2 NWLR (Part 75) 128 at P. 155.\"

The fact relied upon by the plaintiff, that it sold the properties, because it did not know of the existence of an appeal and had not been served with a motion for stay of execution, would not in my view derogate from the fact that, at the time the properties were sold an appeal had been filed. What makes the doctrine of lis pendens applicable is not whether or not the immediate parties to the dispute had notice of the appeal; lis pendens applies by the operation of the law and operates independent of the will of the parties. Even a person who is not a party to the case but who bought the property in dispute is bound by the doctrine. The practice in England is to have the judgment raising lis pendens registered so that any one intending to deal in the property may be put on notice. This is in accordance with sections 4 and 7 of 2 and 3 Vict. C.11, which pro vide for registration of lis pendens. In Nigeria however, we operate under the common law.

The reasoning of the court below would seem to convey that once one of the parties is not aware that an appeal has been filed, the doctrine would not apply. But as was said in Dan Jumbo v. Dan Jumbo (supra), it is not even necessary to bring an application for stay of execution in a case where lis pendens applies. There is no doubt that when an application for stay of execution is brought, it enables the parties to know what is going on and affords the court an opportunity to intervene and give conditions as to the terms of an order staying of execution. Whilst therefore it is advisable and useful to bring an application for stay of execution, the mere existence of an appeal prevents the effective transfer of rights in any property, which is the subject-matter of any action pending in court during pendency in court of the action. In practice 'lis pendens' suspends the individual rights of the parties in the property, which is the subject-matter of a dispute in court.

The peculiar facts of this case must be borne in mind. The trial court had given judgment for the amount claimed in favour of the plaintiff and also made an order that the mortgage properties be sold provided the necessary consents were obtained. The same day the judgment was given, the defendants filed an appeal and a motion for stay of

execution. Unfortunately however, the judge who gave the judgment retired shortly thereafter. The result was that the motion for stay of execution was not promptly served, as there was no sitting judge to give the hearing date. When the plaintiff proceeded to sell the properties, it did so through a private auctioneer, and the court had no notice of it. If the plaintiff had attempted to sell through the court, it would have known that an appeal and a motion for stay of execution had been filed. It seems to me that in the particular circumstances, the plaintiff ought to have made enquiries as to whether an appeal had been filed.

Now, the defendants/appellants in paragraph 1.4 at page 2 of their brief stated:

\"This present appeal is against the decision of the Court of Appeal. It is worthy of note that the Court of Appeal has subsequently allowed the appeal against the judgment of the trial court in the substantive suit.\"

Does the above information preclude this Court from deciding this appeal on its merit' I think not. In the first place, the above information does not convey that there has been no further appeal from the judgment of the Court of Appeal in the substantive suit to this Court. It is common knowledge that the Court of Appeal is not the final court on a matter as this. Secondly, it ought to be borne in mind that a statement that an appeal has been allowed does not in the circumstances of this case translate into a disposal of the case itself considering that an appeal may be allowed and a retrial ordered. Thirdly, we have clear evidence that the defendants\' properties were sold at a time when an appeal, now said to have been allowed, was pending. Unless, I am minded to set the parties on a bout of fresh litigation, in order to set aside the sale already done, and it cannot be ruled out, that the judgment of the Court of Appeal allowing the appeal on the substantive suit, will be effectuated, I must decide this case on its merits. Finally it must be said that facts of this appeal distinctly raise three scenarios, namely:

1. If the judgment of the Court of Appeal in the substantive suit allowed the appeal by dismissing plaintiff\'s suit, it is still necessary to pronounce on the validity of the sale done by the plaintiff whilst the appeal was pending.

2. If there is a further appeal from the judgment of the Court of Appeal on the substantive suit to this Court, it is still necessary to protect the Res in dispute and this also raises the applicability of lis pendens.

3. If the Court of Appeal had in its judgment on the substantive suit ordered a retrial, it still necessary to protect the Res by invoking lis pendens whilst the suit is being retried.

The result is that, a judgment on the merit, of the appeal before us is not just simply desirable; it is necessary and unavoidable if the dispute that led to the appeal is to be finally resolved. It cannot escape attention that neither the plaintiff nor the defendants argued before us that the issues in dispute had ceased to exist following the judgment of the Court of Appeal in the substantive suit.

It seems to me that where a party has a right of appeal which is derived from the constitution of Nigeria and has in exercise of that right filed a valid appeal and raised from the grounds of appeal issues for determination which have been formulated from the grounds of appeal, there is no right or privilege in this Court to refuse to adjudicate on the issues on the ground that the appeal is academic or hypothetical. The defendants' contention from the High Court is that his properties which he mortgaged to the plaintiff were sold whilst litigation concerning same was still pending. The High Court decided in the defendants\' favour that the properties were wrongly sold. The court below reversed the ruling of the High Court; and a further appeal has been brought to this Court.

In Olale v. Ekwelendu [1989] 4 N.W.L.R (Pt. 115) 326 at 349; this Court per Obaseki JSC observed:

\"This court has on several occasions declared and emphasised that the 1979 Constitution which established it has not conferred on it jurisdiction to deal with hypothetical, academic or political questions\"

Similarly in Union Bank of Nigeria Ltd. V. Alhaja Bisi Edionseri [1988J2 N.W.L.R (Pt.74) 93 at 105 this Court per Nnaemeka-Agu JSC said:

\"The constitutional role of this Court as well as all other courts established by or under section 6 of the Constitution of the Federal Republic of Nigeria 1979 is to decide issues between parties in the litigation. In the ipsissimi verbis of the Constitution the courts are empowered to decide:

\'........... all matters between persons or between all government or authority or any person in Nigeria and (to) all actions and pro'ceedings, relating thereto, for the deter'mination of any question as to the civil rights and obligations of that person\'

So under the Constitution, there must be a lis between any of the persons named in section 6 before any court can invoke its judicial power. Conversely, when there is no lis between two parties this Court has no jurisdic'tion, as it cannot indulge in the luxury of a mere advisory opinion, no matter how beneficial it may be to the legal profession or the world at large. It has no constitutional power to do so.\"

Let me say here that although the two cases cited above, Olale v. Ekwelendu (supra) and Union Bank v. Edionseri (supra) dealt with the situation under the 1979 Constitution, the position is still the same under the 1999 Constitution. In the appeal before us there is a lis on which parties are locked in a dispute. The issue in contest relates to a well-known doctrine of the common law. The question is - Ought a party be allowed to sell a property in dispute while there is still litigation pending on the property' As it appears to me, the information that the Court of Appeal has allowed the appeal on the judgment in the substantive suit has only reinforced the necessity for this court to be set aside the sale of the defendant\'s properties. The judgment, which the plaintiff relied upon to sell the properties no longer, exists. This appeal, is no doubt an interlocutory one, but by virtue of the issue in dispute, has acquired a separate life of its own.

I must respectfully say here in clear terms that this appeal is not about the applicability of section 18 of the Court of Appeal Act, which provides:

\"An appeal under this Part of this Act shall not operate as a stay of execution but the Court of Appeal may order a stay of execution either unconditionally or upon the performance of such conditions as may be imposed in accor'dance with rules of court\".

This is because this appeal is not about the failure of the defendants to ask for a stay of execution. They in fact filed an application for stay of execution the same day the judgment was given which did not get off the ground because the trial judge went on retirement shortly after the judgement. This appeal is more about failure of justice than anything else. Should this Court validate the sale of the properties of a party to a dispute at a time when litigation was still pending' It is necessary that I say clearly that section 18 of the Court of Appeal Act does not prescribe or convey that the properties subject to litigation may be sold whilst the litigation is still pending. Rather, what it does is to impose the necessity on a party appealing not to rely on the appeal as creating a stay of execution but to bring an application to enable the Court of Appeal determine whether or not to grant a stay. Neither can section 18 be construed as preventing the court from setting aside the sale of properties done in the course of litigation.

The doctrine of lis pendens had come into existence as a part of the common law and its sole purpose is to ensure that the jurisdiction of the court, in disputes, is not rendered ineffectual through the destruction or transfer from person to person of the property subject to litigation. In its application in Nigeria, it has become a doctrine of constitutional importance. Section 6(6) (a) and (b) of the 1999 Constitution provides:

\"(6) The judicial powers vested in accordance with the foregoing provisions of this section -

(a) shall extend, notwithstanding anything to the contrary in this Constitution, to all inherent powers and sanctions of a court of law;

(b) shall extend to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person;\"

Any law, which prescribes that a property subject to litigation may be sold in the course of the litigation, must be liable to being construed as inconsistent with the jurisdiction of the court to be the final arbiter on the disputes concerning the rights of citizens. Such a law will be pronounced null and void as being inconsistent with the Constitution. It is against this background that one must view section 18 of the Court of Appeal Act. Rather than be seen as a law taking away the right of aggrieved litigant who is appealing, It is in fact to provide a protection to the party who won, so that frivolous appeals are not brought with the sole purpose of holding the hands of the successful litigant from executing his judgment. In the instant appeal, the judgment, which the plaintiff relied upon to effect the sale of the defendant\'s properties no longer exists, the same having been set aside by the same court of appeal which refused to set aside the sale of the defendant\'s properties. Even if the act of the plaintiff is excusable on the ground that it was not aware of the filing of an appeal and application for stay of execution, such justification in my humble opinion could not be given for the refusal of the court below to set aside a sale made during the pendency of an appeal. This connotes an attitude that what has been sold must remain sold. The equitable jurisdiction of the court to annul unconscionable sale would have been cast overboard by such approach.

An appeal is only academic or hypothetical when the questions raised therein do not arise from the facts of the case before the court: See M. O. Eperokun & 2 Ors. V.University of Lagos [1986] 4 NWLR (Pt.33)162. The question whether or not the plaintiff rightly sold the defendants\' properties while a suit thereon was pending cannot be academic. This is because we have the undisputed facts before us that the defendant's properties were sold and that when this was done, an appeal had been filed. The only excuse offered by the plaintiff was that it had no knowledge that an appeal had been filed. The judgment by the Court of Appeal in the substantive suit has no bearing whatsoever on the situation.

In the final conclusion, I am respectfully unable to agree with the lead judgment by my learned brother Kutigi JSC. I would allow this appeal and set aside the judgment of the court below. The ruling of Idahosa J. on 31/03/95 is restored. I award in defendants\'/appellants\' favour against the plaintiff/respondent costs of N10, 000.00.

Judgment delivered by
Aloma Mariam Mukhtar. J.S.C.

After judgment had been given in favour of the plaintiff who is now the respondent in this court, the appellants filed a motion for, 'an order setting aside the execution by way of sale of the judgment of this honourable court'. The appellants had after losing the case applied to the Benin State High Court of Justice for an order of stay of execution, which was not heard. Somewhere along the line, the properties which were the subject matter of the motion were sold during the pendency of the application for stay of execution.

The following depositions are contained in the supporting affidavit of the motion on notice.

\"2. Judgment was given in this case on the 4th day of February, 1994. That same day the 1st and 2nd defendants filed a notice of appeal against the judgment and a motion for stay of execution of the said judgment, both of which are in the court\'s file. The 1st and 2nd defendants also paid for service.

3. By their counter affidavit dated the 17th day of May, 1994 and filed in respect of the application for injunction dated 18/4/94, the plaintiff averred that in execution of the judgment dated the 4/2/94 they have sold 2 of the mortgaged properties. The sale was purportedly made during the pendency of the application for stay of execution and was aimed at foisting a fait accompli on the court. The Governor\'s consent was neither sought not obtained before the purported sale.\"

In its counter-affidavit are the following salient averments:-

\"7. That the plaintiff/respondent has explained the true position of things in its counter/affidavit dated 17/5/94 and filed in respect of the application for injunction dated 18/4/94 before this Honourable Court on 17/5/94.

8. That the Notice of Appeal against the judgment and motion for stay of Execution of the said judgment both of which are in the courts file were not served on the plaintiff/respondent nor its counsel till 17/5/94 in this Honourable court long after the sale of the 2 mortgaged properties.

9. That the averment in applicant's affidavit that the plaintiff/respondent neither sought nor obtained Governors consent before the sale is not true. The plaintiff/respondent was authorized to proceed to sell the properties after the payment.\"

The learned judge before whom the application was moved granted the order of setting aside. Aggrieved by the order the respondent appealed to the Court of Appeal. The appeal was allowed, and the order of the High Court was set aside. Aggrieved by the decision, the applicant appealed to this court on two grounds of appeal, namely:-

1. The lower court erred in law when it held that the sale of the mortgaged property during the pendency of the Notice of Appeal and motion for stay of execution was valid.

Particulars of Error

(a) With the Notice of Appeal and the Motion of stay of Execution, the action in court is still pending;

(b) The doctrine of Lis Pendens prevents the effective transfer of rights in any property which is the subject matter of an action pending in court.

2. The Court of Appeal erred in law when it held that the fact that the motion on notice was not served on the judgment creditor before the sale, took this case outside the purview of Vaswani Trading Company vs. Savalakh & Co. (1972) 12 S.C. 77.

Briefs were exchanged by learned counsel. An issue for determination was raised in the appellant\'s brief of argument, and the issue is:-

\"Whether the lower court was right when it dismissed the appellant\'s application to set aside the sale of the appellant\'s mortgaged property during the pendency of the appeal against the decisions of the lower court and a motion for stay of execution of the said judgment.\"

In the respondent\'s brief of argument is the following issue for determination.

\"Whether having regard to the facts giving rise to this appeal, the Court of Appeal was right in dismissing the appellants\' application to set aside the sale of the appellants\' mortgaged properties sold during the pendency of the appellants\' motion for stay of execution\".

In his brief of argument learned counsel for the appellant has argued that it is for the respondent to ensure that it had power of sale of the mortgaged properties when it purported so to do, and to ensure that there was no pending appeal before it sold. Now, the judgment that gave the respondent liberty to sell the mortgaged properties was delivered on 4/2/94. A notice of appeal was thereafter filed by the appellants, and a motion on notice for stay of execution was also filed, and both were unknown to the
Respondent, when it moved to levy execution on 15/4/94. Surely not having been served with the processes it was ignorant of their existence. The appellants, very well conscious of the gravity of the order made by the trial court should in their own interest, in my view have been diligent enough to have ensured that the respondent was served with the notice of appeal immediately. That is if the mere notice of appeal precludes the respondent from executing the judgment which it has laboured to obtain. By virtue of Section 18 of the Court of Appeal Act 1976 a notice of appeal does not operate as a stay of execution, for it reads thus :-

\"18. An appeal under this Part of this Act shall not operate as a stay of execution, but the Court of Appeal may order a stay of execution either unconditionally or upon the performance of such conditions as may be imposed in accordance

with rules of court.\"

In the circumstance that the respondent was not served with the motion for stay of execution and it was completely ignorant of it, should it have dragged its feet in executing, when it had been anxiously waiting on the case it initiated since 7/11/88' It looks like a situation where while respondent was very much alert, the appellants could afford to sleep. The appellants should have themselves to blame for sleeping for a period of over two months when the properties were sold. I believe they should have been up and doing to ensure that all processes were served on the respondent. There is no way I can fault the finding of the lower court that the facts and circumstance of this case do not fall within the purview of the Vaswani v. Savalakh\'s case supra, for the difference is clear, so to speak. In the Vaswani\'s case the respondent in the application to set aside was very much aware of the pending application for stay of execution, but in this case, the respondent was not, and it has not been disputed.

The appellants in their brief of argument have however informed the court that the Court of Appeal has subsequently allowed the appeal against the judgment of the trial court in the substantive suit. On the other hand, the respondent in its own brief of argument has submitted that the Supreme Court has recently given judgment in respect of that judgment of the Court of Appeal and has sent the matter back for retrial. The appellants have not furnished this court with the basis upon which the appeal to the Court of Appeal was allowed, and if or whether the issue of the propriety or otherwise of the sale of the properties mortgaged was found upon. This court has not seen either of the judgments to be able to determine the futility or otherwise of the present exercise. In this vein, I agree with the lead judgment of my learned brother Kutigi, JSC that the appeal is struck out. I also strike out the appeal.