REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI
CIVIL APPEAL NO 473 OF 1999

NATIONAL BANK OF KENYA LIMITED ……..…………………. APPELLANT

VERSUS

JOLY FAMILY STORES …………….……………………..….. 1ST RESPONDENT
RICHARD MUCHAI AUCTIONEERS ……….…………….... 2ND RESPONDENT

JUDGMENT

(An Appeal from the Judgment of Hon. J. R. Karanja, SPM
in Civil Case No 4277 of 1996 delivered on 8th October, 1999).

This is an appeal by an unsuccessful Defendant from the decision of the lower court by which that Defendant was ordered to pay a sum of Kshs.198,000/= to the successful Plaintiff. To understand the issues in the appeal, I will set out the history of the case.

The 1st Respondent sued the Appellant and another in the lower court seeking Judgment against them jointly and severally as follows:

"(a) Loss of user (particulars to be supplied at the hearing hereof)
(b) General damages
(c) (Interest)
(d) (Other relief)."

The basis of the claim was that the Appellant, which was a decree holder in another suit, instructed the 2nd Respondent who is an auctioneer, to attach the 1st Respondent's motor vehicle. The 1st Respondent's position in the lower court was that that attachment was unlawful. Both Defendants to the suit filed defences in which they denied the 1st Respondent's claim.

In the case of the Appellant, it was averred that the execution process complained of was done by the 2nd Respondent as an agent of the Court. The 2nd Respondent on its part sought to avoid liability by saying that it was the agent of the Appellant.

When the case came up for hearing the parties called witnesses in support of their respective positions but a lot of things were clear. It was common ground that the Appellant obtained a decree against a 3rd party. It instructed the 2nd Respondent through its Advocates to execute that decree. In the process of executing that decree, the 2nd Respondent attached a motor vehicle which belonged to the 1st Respondent. Two days after the attachment, the Appellant's Advocates informed the 2nd Respondent that the 3rd party had made an acceptable repayment proposal and instructed the 2nd Respondent to release "the goods you have attached upon payment of your charges". There is no question that the "goods" referred to was the motor vehicle in dispute. As fate would have it, the motor vehicle was not released peacefully not to mention the delay that

followed. It took the intervention of the Court to have the motor vehicle released after the 1st Respondent successfully mounted objection proceedings. Only that it took about 100 days since the attachment to have the motor vehicle released to its owner. From the testimony placed before the lower court, the 2nd Respondent could not release the motor vehicle in dispute as the 3rd party had not paid its charges and only did so upon the direction of the court.

At the conclusion of the trial, the Learned Magistrate in the Court below found in favour of the 1st Respondent against the Appellant only and entered Judgment in the manner set out earlier. In so doing, the Learned Magistrate was convinced that the 2nd Respondent was in fact an agent of the Appellant when it attached the 1st Respondent's motor vehicle in execution of the decree in the earlier suit. In delivering himself in this regard, the Learned Magistrate said as follows:

> **"It would be a misdirection and misconception if the 2nd Defendant (the 2nd Respondent in this appeal) were to be treated as having acted as an agent of the court in the material transaction. The humble role of the Court in the transaction was to merely issue the warrants of attachment and sell pursuant to the 1st defendant's (Appellant's) application".**

The Learned Magistrate was also of the view that the Appellant as the decree holder in the earlier suit was bound "to lay the foundation for the attachment and give leads to … (the 2nd Respondent)".

In awarding the Judgment which consisted of special damages, the Learned Magistrate discounted the fact that the receipt in support of the said claim was not in the name of the 1st Respondent but in the name of the 1st Respondent's Director. However, the Court rejected the claim for general damages.

Before I consider the foundation of the appeal, I would like to point out now that before the commencement of the trial in the court below, the 1st Respondent's Advocate successfully applied (the Defendants objected) to amend the Plaint to show the amount claimed as "special damages" as Kshs.198,000/=.

The Appellant was aggrieved by the decision of the lower court and appealed to this Court. The appeal was founded on 10 Grounds of Appeal set out in the Memorandum of Appeal as follows:

> ***1. The learned Magistrate erred in law and in fact in finding that the 1st Respondent's case had been proved on a balance of probability.***
> ***2. The trial Magistrate erred in finding that the Appellant was negligent.***
> ***3. The trial Magistrate erred in law and in fact in finding that the 2nd Respondent was an agent of the Appellant and not of the Court. Further, the trial Magistrate erred in law by failing to apply settled principles of law that the 2nd Respondent was indeed an agent of the Court.***
> ***4. The trial Magistrate erred in law and in fact in finding that the Appellant was liable for the wrongful attachment of the motor vehicle.***
> ***5. The trial Magistrate erred in fact in finding that the 1st Respondent had proven its claim for special damages.***
> ***6. The learned Magistrate erred in law allowing the 1st Respondent to amend his pleadings to include special damages of Kshs.198,000/= on the onset of the hearing.***
> ***7. The learned Magistrate erred in law and fact in finding that the 1st***

Respondent had proved ownership of the subject motor vehicle.
8. The learned Magistrate erred in law in not following the established procedure in the examination of witnesses.
9. The trial Magistrate failed to consider the weight of the evidence tendered by the Appellant.
10. There was no basis for the finding that the Appellant pointed out the vehicle to the 2nd Respondent or in any way controlled the execution process.

At the hearing of this appeal Mrs Bor for the Appellant did not argue those Grounds in any particular sequence but attacked the decision of the lower court from four angles: Firstly, whether the 1st Respondent had proved its case in the lower court; secondly, whether the Appellant pointed out to the 2nd Respondent the motor vehicle which was attached; thirdly, whether the 2nd Respondent was an agent of the Appellant; and fourthly, she revisited the manner in which the Plaint was amended.

Ms Bor argued that there was no evidence led in the court below to support the fact that the motor vehicle in dispute belonged to the 1st Respondent nor was there evidence to show how the amount of hire of alternative transport was arrived at. She also argued that the name given in the hire agreement was different from the name of the 1st Respondent's "Director". These, in my view, are red herrings. It had been resolved in the objection proceedings, in which the Appellant participated, that the motor vehicle in issue belonged to the 1st Respondent. The motor vehicle had been assigned for use to the 1st

Respondents "Director". When the motor vehicle was attached in the manner described, that Director was deprived of its use and was forced to hire alternative transport and there can be no doubt that that was paid for. Although the money may have been paid by the Director and receipt of the payment acknowledged in that Director's name (never mind the slight difference in the names), the 1st Respondent was entitled to claim that money as it had been deprived of its motor vehicle which was to be utilized by its Director.

On the second matter, I am inclined to agree that the trial Magistrate was not clear how he came to believe the testimony of the 2nd Respondent and chose to disbelieve the testimony led on behalf of the Appellant that the Appellant pointed out the motor vehicle which was attached. I have painfully reviewed the record of the lower court and it is very difficult to find support for that conclusion. How could the lower court believe the 2nd Respondent when the 2nd Respondent could not even state the name of the Appellant's officer who did so? From the record, the 2nd Respondent was a man of the industry with 20 years experience. He must have known the importance of noting the persons who pointed out the property he was to attach. I think the trial Magistrate believed the 2nd Respondent casually and did not take a second opportunity to remind herself that the 2nd Respondent could say anything to save his skin so to speak. But again, as will be seen later, this is not central to the decision of this appeal nor was it in fact central to the proper determination of the case in the lower court.

With regard to the law applicable, I think the third matter was the core issue and if not for any more reason than that, I will consider it last. So now, I go to the fourth matter raised by the Appellant's Counsel.

The fourth matter is also a red herring. It is now well established beyond peradventure that the courts have wide discretion in allowing amendments of pleadings to enable them adjudicate on the real issues in controversy between the contestants before it. Ms Bor did not pretend that the Court below did not have jurisdiction to amend the Plaint as it did. Her complaint was that the amendment was effected "without formal application" and that her client was not given an opportunity to oppose it. That is not quite so. The record clearly shows that the application was made orally and the Appellant's Counsel

responded before a decision was made on the question. I have myself reflected on the point and I think the trial Magistrate took the correct course in allowing the amendment as it was something that would assist the court deal with the real issues in controversy. How could the Appellant complain when it knew from the Plaint that what the 1st Respondent sought was damages for loss of user and notice had been given that particulars would be supplied later? The amendment under challenge was nothing more than to set out those particulars. It was not advanced in the court below nor was it advanced before me that the amendment would cause grave injustice to the Appellant. The amendment was effected before the trial commenced and the defendants in the court below had sufficient opportunity to advance their defences notwithstanding the amendments. That criticism is therefore not of any material weight.

Finally, onto the main issue now. Was the 2nd Respondent the agent of the Appellant in the attachment as to warrant holding the Appellant liable for the attachment complained of? To answer this point, one must understand the position of auctioneers such as the 2nd Respondent in the execution of decrees passed by the courts.
Contrary to the finding of the trial Court, auctioneers, while executing decrees of the courts, are indeed agents of the Court. It is the courts which give them authority to execute, for example by the different modes of warrants and the same court can order them to stop an execution process. That happened in this case. The Court below was guided by no better authority than the case of ***Davis and Shirtliff vs Attorney General KLR 273*** but it failed to get the point. In that case, the Court of Appeal clearly pointed out that "court brokers" (and there is no difference with auctioneers executing decrees of the court) are agents of the Court and that authority was followed in ***Nairobi City Council vs Patel KLR 60***. In my view, the decision of the lower court was greatly guided by the wrongful view that the 2nd Respondent was an agent of the Appellant. That was a grave error and on this finding the appeal must succeed.

In the result, I allow the appeal and set aside the decree of the lower court and substitute it with an order dismissing the suit against the Appellant with costs. The Appellant will also have the costs of this appeal.

Dated and delivered at Nairobi this 10th day of March, 2005.

ALNASHIR VISRAM
JUDGE