

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Case 56 of 2003

TORNADO CARRIERS
PLAINTIFF

- Versus -

CRESCENT CONSTRUCTION
DEFENDANT

Coram: Before Hon. Justice Mwera

Mutubia for Applicant/DH

N/A for Respondent/JD

Lijodi for the Garnishee

Court clerk – Kazungu

R U L I N G

The plaintiff decree-holder, asked this court under the provisions of Order 22 rules 1, 10 Civil Procedure Act that the proceeds of the decree the defendant M/s Crescent Transportation Company has against the garnishee herein, Sunbird Company Ltd. in the sum of Sh. 1,255,365/08, following the judgment in favour of the defendant in SRMCC 821/2003 against Sunbird, be attached to pay to the plaintiff and thus partly satisfy its decree herein of Sh. 3,023,340/= which has remained unsatisfied since 25/3/2004. That was basically Mr. Mutubia's argument in that the decree in SRMCC 821/2003 which Crescent was about to execute constitutes a debt which under the provisions of order 22 rule 1 Civil Procedure Rules can be attached.

Mr. Lijodi's position was that that decree followed a judgment in a running-down case where the plaintiff, Crescent, in SRMCC 821/2003 can only recover if it gets a declaratory judgment against Sunbird. That in the light of ISRAELSON VS DAWSON (PORT OF MANCHESTER INSURANCE CO. LTD., Garnishee) (1933) 1 KB 301 liability under a policy of insurance cannot constitute a debt. Mr. Lijodi added that a company called United Insurance had insured Sunbird. That it was no longer in business and that similarly Crescent no longer operates in Kenya.

In the court's view the applicant has a decree against Crescent. It has not been satisfied. Equally true and admitted, Crescent has an unsatisfied decree against Sunbird, the garnishee herein. Without going behind, and particularly the state of things in SRMCC 821/2003 or which party has done/gone where, this court holds that the decretal sum due from Sunbird to Crescent is a debt in the context of Order 22 rule 1 Civil Procedure Rules. A certain sum of money is stated in that decree as due to Crescent from Sunbird. If it is not paid Crescent may attach the properties of Sunbird, sell the same and realize the decretal sum. But Sunbird can as well pay that sum directly to the applicant only that the applicant cannot sue to recover it. The proceeds of that decree will only be attached if it is paid. Accordingly the applicant is granted orders absolute.

The Israelson case above is not applicable here. First, Mr. Lijodi did not place before this court the contents and extent of the application of Order 45 rule 1 of the Rules of the Supreme Court (UK) to see if

they are in substance the same as in our Order 22 rule 1 Civil Procedure Rules. Secondly, In that case the applicant (injured party) went straight to seek garnishee orders against the insurer Port of Manchester Insurance Company Ltd. arguing that since it had a liability to compensate the insured under the insurance policy issued, then the applicant was as well entitled to direct attachment of what was due under that policy. That could not be. And that is not the case here.

In sum the orders are granted with costs.

Delivered on 1/12/2005.

J.W. MWERA

JUDGE