

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
HIGH COURT CIVIL CASE NO. 2129 OF 2000

LESUKUT LIMITED.....PLAINTIFF

V E R S U S

JOSEPH MWANIKI MUTHAMADEFENDANT

R U L I N G

The Defendant was employed by the Plaintiff between the years 1988 and 2000. He misappropriated to his own use moneys had and received on behalf of the Plaintiff. The Defendant admitted to having misappropriated the Plaintiff's money and made some payments towards reducing the same. On 13th December, 2000, he absconded from work. The Plaintiff then filed this suit 6 days later seeking to recover K.shs. 1,186,410.60/=. On the same day, it filed an application under Order XXXVIII rules 1 and 12 of the civil Procedure Rules (hereinafter referred to as "the Rules") seeking to attach two named motor vehicles before attachment which were said to belong to the Defendant. The order for attachment before judgment was granted ex parte on 20th December, 2000 by my Learned Brother KULOBA, J. The order was stated to remain in force for 90 days.

On 10th January, 2001, the Defendant was served with a Proclamation of Attachment before Judgment by Base Auctioneers. This was before any notice had been served on him. On 11th January, 2001, the Defendant went to see his employers who referred him to their Advocates. He went to the Advocates on the same day. It was only then that he was served with summons in respect of this matter. In view of these matters, the Defendant filed an application in this Court on 25th January, 2001 seeking to set aside the order for attachment already mentioned and to have his motor vehicle registration number KAK 884T which had been attached released. In his affidavit in support of his application to set aside, he admitted being indebted to the Plaintiff in the sum of K.shs. 354,760/=.

The Defendant filed his defence on 5th February, 2001 and stated that his liability was only in the sum already stated to have been admitted above. He averred that his efforts to pay this sum had been frustrated. On 7th February, 2001, the Plaintiff applied for judgment on admission under Order XII rule 6 of the Rules. That application was also stated to have been brought under Order IV Rule 13 (b,c&d), Order XXXV Rules 1, 2, 9 and 10 and Order L Rules 10 and 11 of the Rules but those provisions are not relevant in that application. In fact, there is no rule 13 under Order IV. Without more, I allow the application for judgment on admission and enter judgment in that respect for K.shs. 354,760/= in favour of the Plaintiff. There is no more clear evidence to entitle this Court to enter any judgment under Order XXXV as the annexures in support do not indicate any liability to warrant such a course.

Mrs. Muhuhu, for the Defendant, argued that the ex parte order issued by KULOBA, J. was illegal as the Defendant was never called upon to furnish security before the order was made. She also argued that that order was issued against the principles of natural justice. Mr. Hira for the Plaintiff, on the other hand, argued that the Defendant had to show that the ex parte order was irregular to have it set aside or furnish security. He argued that based on the nature of the application it is always ex parte. The question is whether the order made by this Court on 20th December, 2000 is proper.

Order XXXVIII rule 1 of the Rules, under which the application was stated to be brought provides as follows:-

"1. Where at any stage of a suit, other than a suit of the nature referred to in paragraph (a) to (d) of section 12 of the Act, the court is satisfied by affidavit or otherwise -

(a) that the defendant with intent to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him -

(i) has absconded or left the local limits of the jurisdiction of the court; or

(ii) is about to abscond or leave the local limits of the jurisdiction of the court; or

(iii) has disposed of or removed from the local limits of the jurisdiction of the court his property or any part thereof; or

(b) that the defendant is about to leave Kenya under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit the court may issue a warrant to arrest the defendant and bring him before the court to show cause why he should not furnish security for his appearance:

Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim; and such sum shall be held in deposit by the court until the suit is disposed of or until the further order of the court."

The Provisions of that rule are clear beyond peradventure. In the present case, there is no evidence whatsoever that the Defendant was ever given an opportunity to furnish security as provided under that rule. With all due respect, I think that my Learned Brother, KULOBA, J. was not guided properly when he made the order which he did in this circumstances. It is not true as Mr. Hira argued that the nature of the application under Order XXXVIII is *ex parte*. If it were so, what would be the need of arresting the Defendant to "bring him before the Court to show cause why he should not furnish security for his appearance"? It may well be that the application for the warrant is *ex parte* but not the hearing on the matter of security. Rule 5 of the same order which in my view would have been relevant in the circumstances is to the same effect. The decision of **Narendra A. Patel v. Sunaj Ben** [1960] E.A. 386 relied on by Mr. Hira is distinguishable in that in that case the Defendant had been arrested and brought before the Judge and furnished the necessary security and was released. In that case the process had been followed as laid down. That is not the case here. This court's order made on 20th December, 2000 must and is hereby set aside *ex debito justitiae*. In any event, that order has now lapsed and is of no legal effect.

DATED and DELIVERED at NAIROBI this 19th day of July, 2001.

ALNASHIR VISRAM

JUDGE