



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

CORAM: GICHERU, OMOLO & SHAH, J.J.A.

CIVIL APPLICATION NO. NAI 24 OF 1998 (11/98UR)

BETWEEN

LAKELAND MOTORS LIMITED ..... APPLICANT

AND

HARBHAJAN SINGH SEMBI ..... RESPONDENT

**(Application for stay of execution and mandatory**

**injunction from the judgment/orders of the High Court of**

**Kenya at Kisumu (Wambilyangah, J.) dated 21st January, 1998**

**in**

**KISUMU H.C.C.C. NO. 227 OF 1997)**

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**RULING OF THE COURT:**

In this application the applicant has sought a stay of execution of the decree passed in the Kisumu High Court Civil Case No. 227 of 1997 and dated 21st January, 1998 together with a mandatory injunction against the respondent directing the return of the appellant's attached goods to the latter's premises pending the hearing and determination of the applicant's intended appeal. Besides all else, the applicant's complaints centre around the manner in which the decree the execution of which is sought to be stayed was obtained; the flouting of section 94 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, hereinafter called the Act; and the failure to comply with the provisions of rule 12 (b) of the Auctioneers Rules, 1997.

It is common ground that after the trial of the suit referred to above on 21st January, 1998 judgment was given on the same day in favour of the respondent in the sum of K.Shs.5,264,435.55 with interest at court rates from the date of filing suit, that is to say, 20th May, 1997. In the same court, the applicant had on 20th January, 1998 filed a winding up Cause NO. 1 of 1998 petitioning its being wound up under the relevant provisions of the Companies Act, Chapter 486 of the Laws of Kenya and on the strength of that Cause applied for stay of the proceedings in the suit referred to above under section 223 of the aforesaid Act. That application was set down for hearing and was heard on the same day the suit from which the decree, the execution of which is now being sought to be stayed, arose. It was dismissed. Apprehensive that the applicant was in the process of disposing of its assets the result of which would be to frustrate the

decree passed in his favour, the respondent without the knowledge of the applicant and in total disregard of the relevant provisions of Order XX rule 7 of the Civil Procedure Rules relating to preparation of decrees, extracted a decree on 23rd January, 1998. This was after he had on 22nd January, 1998 applied to the Deputy Registrar, High Court of Kenya at Kisumu to be issued with a court warrant of attachment and sale of the applicant's movable properties before taxation purportedly under the provisions of section 94 of the Act. The respondent had on the same day obtained from the same Deputy Registrar an ex parte order dispensing with his compliance with rule 12 (b) of the Auctioneers Rules, 1997. Subsequent thereto, the applicant's goods were attached and advertised for sale by public auction on Saturday 14th February, 1998 at 11.30 a.m. and thus prompting the present application.

The exercise of judicial discretion by the superior court under section 94 of the Act necessarily requires that parties to a decree passed by that court in the exercise of its original civil jurisdiction should be availed an opportunity to be heard before making an order for execution of that decree before taxation. This, we think, is the spirit of the observation of Shah, J.A., with which we agree, in *BAMBURI PORTLAND CEMENT COMPANY LIMITED V. IMRANALI CHANDBHAI ABDULHUSSEIN*, Civil Appeal No. 83 of 1995 (unreported) in regard to the application of section 94 of the Act. Save for the letter dated 22nd January, 1998 addressed to the Deputy Registrar, High Court of Kenya, at Kisumu seeking the issuance of a court warrant of attachment and sale of the applicant's movable properties before taxation under the aforesaid section, it does not appear on the record before us that the applicant was even made aware of this move by the respondent.

This apart, it does not also appear, and this was not contested by Mr. Kasamani for the respondent at the hearing of this application on 18th February, 1998, that the applicant was involved in the preparation of the decree passed by the superior court in the Civil Suit referred to at the beginning of this ruling as is required by the relevant provisions of Order XX rule 7 of the Civil Procedure Rules. Finally, rule 12 (b) of the Auctioneers Rules, 1997 requires that:

"Upon receipt of a court warrant or letter of instruction the auctioneer shall in case of movables other than goods of a perishable nature and livestock - prepare a proclamation in Sale Form 2 of the Schedule indicating the value of specific items and the condition of each item, such inventory to be signed by the owner of the goods or an adult person residing or working at the premises where the goods are attached or repossessed, and where any person refuses to sign such inventory the auctioneer shall sign a certificate to that effect."

There does not appear to be any provision in the Auctioneers Act, 1996 nor in the Auctioneers Rules, 1997 for dispensing with the foregoing rule. Yet the respondent proceeded to execute the decree and physically attach the applicant's movable goods without complying with the said rule. The flagrant disregard of the provisions of this rule smacks of gross irregularity in the respondent's execution process of the decree of the superior court in Civil Case No. 227 of 1997. It would be an abuse of the process of this Court if we were to countenance such an execution. Hence, while we decline to order a stay as requested by the applicant under rule 5 (2) (b) of the Rules of this Court as outlined at the commencement of this ruling, we think that on account of the respondent's non-compliance with the law in the execution process of the decree as we have indicated in this ruling and to prevent abuse of the process of this Court, in the exercise of our inherent power under rule 1 (3) of the aforesaid Rules the said execution process must and is hereby set aside. As we have declined to order a stay of execution we will make no order as to the costs occasioned by this application. However, the costs occasioned by the irregular and wrongful attachment including the court broker's costs shall be borne by the respondent.

Dated and delivered at Nairobi this 20th day of February, 1998.

J. E. GICHERU

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JUDGE OF APPEAL

R. S. C. OMOLO

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR