**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**
**AT NAIROBI**
**(Coram: Gicheru, Tunoi & Shah, JJ.A.)**
**CIVIL APPEAL NO. 172 OF 1998**
**BETWEEN**

**OFFICIAL RECEIVER AND PROVISIONAL LIQUIDATOR**

**NYAYO BUS SERVICE CORPORATION.....APPLICANT**

**AND**

**FIRESTONE E.A. (1969) LIMITED.....RESPONDENT**

**(An appeal from the Order of the High Court of Kenya at Nairobi (O'kubasu, J.) dated 2nd April, 1998 in H.C.C.C. NO. 2935 OF 1996)**
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**JUDGMENT OF THE COURT:**

The respondent filed, in the superior court, on the 26th November, 1996, a suit against Nyayo Bus Service Corporation (the corporation), seeking judgment in the sum of Shs. 13,577,184/15 being the value of goods sold and delivered by the respondent to the corporation during the years 1995 and 1996. At the time the suit was filed the corporation was not in liOqnu id2a5ttiho n. February, 1997 one George M. Mitine, the Investment Secretary/Co-ordinator to the Department of Government Investment and Public Enterprise in the Ministry of Finance, Government of Kenya, lodged a petition to wind up the corporation, the corporation being indebted to the said Department and being unable to discharge its indebtedness.

On 25th May, 1997 the superior court (Ole Keiuwa, J.) ordered that the corporation be wound up by court under the provisions of the Companies Act, Cap. 486, Laws of Kenya (the Act) and that the Official Receiver be constituted Provisional Liquidator of the affairs of the corporation.

The respondent then requested for entry of judgment against the corporation by its advocates. That request for judgment was dated 10th January, 1997. The Principal Registrar of the superior court had made the following entry on the letter for request for judgment: "I thought Nyayo Bu s Corporation was under Receivership if so, leave to sue needed."

The Principal Registrar was in error. Leave to sue is needed only when a corporation or a company is in liquidation. However, nothing turns on that for the purposes of this appeaTlh.e respondent then applied for leave to proceed against the corporation and on 24th October, 1997 the superior court (Hayanga, J.) granted to the respondent leave to proceed against the corporation and he ordered further that the interim liquidator be served.

Judgment in default of appearance was thereafter entered on 19th December, 1997 and upon an application by the respondent, the superior court issued a warrant of attachment of movable properties of the corporation in execution of the decree. The said warrant was dated 20th February, 1998.

The interim liquidator, through M/s Wambugu & Company, advocates applied to have the execution of the said warrant stayed and sought, at the same time, a review of the attachment order dated 20th February, 1998 on the grounds that execution against a company in liquidation was void and that the decree-holder being unsecured creditor ought to direct its claim to the provisional liquidator in accordance with the Act. On 20th March, 1998 the superior court (Sheikh Amin, J.) granted an interim injunction for 14 days and ordered that the application be heard inter partes on 31st March, 1998 by PatelT, heJ .respondent filed, on 25th March, 1998, an application to have the order made by Sheikh Amin, J. vacated on grounds that the interim liquidator sought no leave pursuant to s. 228 of the Act; that the affidavit in support of the application was defective; that grounds on which the application was based were not set out in the body of the application; that the application did not have the foot-note informing the respondent (to the application) what could happen if it did not attend court; that it did not disclose material particulars; that the application was scandalous, frivolous and vexatious etc.

Both applications were heard together by the superior court (O'Kubasu, J.) who dismissed the interim liquidator's application for review and allowed the respondent's application to have the orders of Sheikh Amin, J. vacated. That was on 2nd April, 1998.

The provisional liquidator (the Official Receiver) of the Corporation then lodged this appeal in this Court and seeks to have set aside (1) the orders of the superior court dated 2nd April, 1998, and (2) orders issuing warrants of execution dated 20th February, 1998. The appellant also seeks orders to direct the respondent to lodge its claim as an unsecured creditor. Section 225 of the Act says:

> ***"225. Where any company is being wound up by the court, any attachment, distress or execution put in force against the estate or effect s of the company after commencement of the winding up shall be void."***
>
> ***Section 226(2) of the Act says: "226(1) ----------***
>
> ***(2) In any other case, the winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding up".***

Mr. David Njogu who appeared for the appellant (the Official Receiver and provisional liquidator of the corporation) argued the first four grounds of appeal together. The substance of his argument is that once the corporation was placed under liquidation, that is to say, after commencement of winding up, any execution levied against the assets of the corporation is void and that therefore the issuance of warrants of attachment dated 20th February, 1998 was void and the superior court had power to review the attachment order and recall it.Mr. Kipkorir in response to Mr. Njogu's arguments urged that section 225 of the Act was applicable only where winding up proceedings were still going on but not after a winding up order was made. With respect, Mr. Kipkorir's argument does not hold water. In this particular case the winding up of the corporation is deemed to have commenced at the time of presentment of the petition for the winding up, that is to say 25th February, 1997. See section 226(2) of the Act. Section 225 of the Act provides in no uncertain terms that any attachment after commencement of the winding up "shall be void". It is clear therefore that the superior court has power to review proceedings in an action when the same are void. The right to have an issuance of the warrant of attachment set aside when the issuance is void ab-initio by way of a review application is one remedy the provisional liquidator of a company has. Mr. Kipkorir's argument that a creditor can move to attach after a winding up order is made is incorrect.The order for winding up places the company in the custody of the provisional liquidator and the company remains under winding up provisions until it is actually wound up whereafter of course there is nothing much left to do.

Mr. Kipkorir advanced another argument, that is, that the respondent became a preferred creditor upon judgment being entered in its favour. A judgment debt, as opposed to a secured debt, taken no priority. It

remains an unsecured debt.

The learned judge found that the appellant had come to court too late, when the vehicles were already attached and sold. the effect of a legally void attachment is that the attachment is unlawful and there could have been no sale or sales. In saying that the appellant came to court too late the learned judge, with respect, erred. If an attachment is void, it remains void.

Coming back to the powers of the court to review (grounds 6 and 7 of the memorandum of appeal), we are of the view that the learned judge erred in relying on the ratio decidendi of the decision of this Court in the case of National Bank of Kenya vs. Ndungu Ngali, Civil Appeal No. 211 of 1996, (unreported). The learned judge said that incorrect exposition of the law is no ground for review. As a general rule, that is a correct statement. But the issue before the learned judge was not that of an incorrect exposition of the law. It was that of a void execution. Section 80 of the Civil Procedure Act enables a court to make such orders on a review application which it thinks just so that the words "or for any sufficient reason" as used in Order 44 rule 1 of the Civil Procedure rules are not ejesdem generis with the words "discovery of new and important matter" etc and "some mistake or error apparent on the face of the record."Those words extend the scope of review. It was stated by Gachuhi Ag. J.A. (as he then was), with the concurrence of Hancox JA (as he then was), and Nyarangi JA in the case of Wakahihia vs. Thiongo [1982-88] 1 KAR 1028, at page 1031 as follows:

> ***"Mr. Ghadially argues that the application for review should be on fresh facts which were not available at the time. The point here is not of fresh evidence but the point of law which underlie the proceed ings which render the proceedings a nullity."***

In the case of Wangechi Kimita vs. Wahibiru [1982-1988] 1 KAR 977 Nyarangi J.A. with the concurrence of Hancox J.A. (as he then was) and Kneller J.A. (as he then was) said at page 980:

> ***"I see no reason why an y other sufficient reason need be analogous with the other grounds in the order because clearly s 80 of the Civil Procedure Act confers an unfettered right to apply for a review and so the words `for any sufficient reason' need not be analogous with the o ther grounds specified in the order: See Sadar Mohamed vs. Charan Singh [1959] E.A. 793."***

It is trite that once an act is a nullity ab initio no amount of argument can render it correct. Any purported auction sale was therefore also void and no title can be granted to any of the bidders who allegedly made some downpayments.

Our conclusion is that the attachment of the appellant's goods was void and that the warrants of attachment were issued in error and should be set aside and that the respondents must bear the costs of attachment (execution).

This appeal is therefore allowed with costs. The appellant will also have costs of the proceedings he took in the superior court. As regards directing the respondent to lodge its claim with the Official Receiver, as an unsecured Creditor, we can make no orders as that is a matter for the respondent to decide.

**Dated and delivered at Nairobi this 26th day of March, 1998.**

**J.E. GICHERU**

**JUDGE OF APPEAL**

**P.K. TUNOI**

**JUDGE OF APPEAL**

**A.B. SHAH**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**