



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA
(CORAM: OMOLO, SHAH & OWUOR, J.J.A)
CIVIL APPEAL NO. 118 OF 1997**

**ABDALLA ALI HUSSEIN
MOHAMED.....APPELLANT
AND
CLEMENT A. OJIAMBO1STRESPONDENT
(ORIGINAL PLAINTIFF)**

AND

1. FARUK ALI HUSSEIN

2. HUSSEIN SHARIF2NDRESPONDENTS

(Appeal from an Order of High Court of Kenya at Mombasa

(Honourable Lady Justice M. Ang'awa) dated 26th June,1997

in

H.C.C.C NO. 471 OF 1993)

JUDGMENT OF THE COURT

Pursuant to the issuance of a warrant of attachment of movable property, in H.C.C.C No. 471 of 1993, the court brokers, in execution of the said warrants, attached a motor vehicle registration number, KAA 198K on the 15th of May, 1997. The said vehicle was at one time the property of one of the judgment-debtors namely Hussein Sharif Ali that is the second of the second respondents before us in this appeal. We will refer to the said vehicle as "**the suit vehicle**" hereinafter.

The suit vehicle was on the 27th day of April, 1993, involved in an accident with the first respondent who was riding a bicycle in the Nyali Estate of Mombasa near Mamba Village. The first respondent (**the decree-holder**) sued the second respondents (driver and owner respectively of the suit vehicle) and was awarded a sum of Shs. 319,000/= as damages plus costs and interest, and the aforesaid attachment was carried out purportedly in execution of the decree which followed the award of damages.

The appellant (objector) objected to the said attachment in terms of Order 21 rule 53 of the **Civil Procedure Rules** and the deputy registrar of the superior court in compliance with **Order 21 rule 54** stayed the said execution and called upon the decree-holder to intimate to the Court within the next fifteen days whether or not he wished to proceed with the attachment.

The decree-holder was obliged by virtue of **Order 21, rule 55** to so notify the objector but he did not do so. Instead of asking the court by an ordinary letter for lifting of the attachment, the objector moved the Court by way of a notice of motion under Order 21, rule 55 and section 3A of the Civil Procedure Act for raising of the attachment on the suit motor vehicle at the same time seeking damages, against the

objector, in the sum of Shs. 2,000/= per day the attachment remained in force.

Mr. Mutisya for the objector obviously must have assumed that the decree-holder was not going to raise the attachment when he filed the said notice of motion and invited the court to make the orders sought. Once the Court was so invited the Court had no option but to hear the application and the application was heard on merits. The decree-holder filed grounds of opposition and replying affidavit to oppose the application. After hearing both sides the superior court (**Ang'awa, J**) dismissed the application with costs and declined to raise the attachment. It is against those orders that the present appeal was filed with leave of the superior court.

If the appellant had not filed the notice of motion in question and if he had moved simply under **Order 21 rule 55** by way of a letter for raising of the attachment (subject to extension of time perhaps being granted for a response from the decree-holder) the objector could have been in different position. But in this instance, he obviously assumed that the decree-holder was not agreeable to raising the attachment and hence filed his notice of motion thereby giving the superior court an opportunity to inquire into the factual position.

The learned judge was of the view that the second of the second respondents had by transferring the suit motor vehicle to the objector 'evaded' the execution. She was not satisfied on the bona fides of the objection on the following basis:

1. The suit motor vehicle was being operated without a road licence between January and May, 1997.

2. The registration book of the suit motor vehicle did indicate that both the transferee (debtor) and the transferor used the same Post Office box number. 3. The transferee did not state what consideration he had paid (and when) for the alleged purchase of the suit motor vehicle.

4. There was an obvious inference to be drawn that the alleged transfer was done to avoid the process of execution.

5. The debtor did not pay the proceeds (if there was a genuine sale) to the judgment creditor.

We agree with the learned judge. She was entitled to infer these matters as she did from the material placed before her.

The alleged transfer was made only when the execution of the decree was about to be made. The judgment-debtor's insurers had been wound up. The period of transfer was too near the attachment date from which fact (inter alia) she concluded that the same was not genuine and was intended to avoid the due process of execution.

Mr. Mutisya relied heavily on a ruling of this Court delivered on 3rd October, 1997, pursuant to an application between the same parties made under rule 5(2)(b) of the Rules of this Court. This Court said:

"The plaintiff failed to comply with rule 55 of the Order and the objector started objection proceedings which the learned judge dismissed holding, in effect, that the second defendant sold the vehicle to the objector with intent to delay the plaintiff. That may well be so, but the truth of the matter is that although the motor vehicle was involved in the accident, it was not the subject matter of the suit. There is nothing in law to stop the second defendant disposing of his assets as he wished before the auctioneers arrived. At the time of the attachment, the vehicle did not belong to him and it did not form part of his assets. It was now the property of the objector.

The attachment of the vehicle was patently illegal and therefore we have no alternative but to grant the stay sought."

With respect, the Court hearing an application under **rule 5(2(b))** was not called upon to decide whether the attachment was illegal. That Court's function was to see if the intended appeal was an arguable one and whether the result thereof, if the appellant succeeded, would render the victory nugatory. The court was not called upon to decide the legality of the attachment. Therefore, with respect, what the Court said was obiter and we cannot be influenced by the dicta as we are hearing the appeal itself. It remains for us to decide, in this instance, if the transfer to the objector was genuine or was done with a view to avoid the process of execution and as already stated, we agree with the learned judge in regard to the inferences she drew. She could not have inferred otherwise.

Mr. Mutisya raised an issue which obviously was not for him to raise. He argued that once a judgment-creditor has taken a particular step in execution he is barred from taking up any other mode of execution. Without ruling on the validity of his argument, in this appeal we can only say that he cannot speak for the judgment-debtor when he acts for the objector.

Mr. Mutisya laid stress on the effect of the registration book of the suit motor vehicle showing the objector as the registered owner of the vehicle and relied on the provision in **section 8 of the Traffic Act (Cap 403, Laws of Kenya)** to say that the objector, because of that provision, is deemed to be the owner of the suit motor vehicle. Section 8 of the Traffic Act simply states that unless the contrary is proved, the person in whose name the motor vehicle is registered is deemed to be the owner. In other words the fact of registration is only prima facie evidence of ownership and contrary facts can show otherwise and in this case there was sufficient material before the learned judge to conclude that such registration was effected to avoid the execution of the decree. In the result this appeal is dismissed with costs. To leave no room for doubt we order that if any storage charges are payable to the court broker the same would be paid by the objector. If there is no agreement on storage charges the storage charges may be assessed by the Deputy Registrar of the superior court.

Dated and delivered at Mombasa this 24th day of July,

1998.

R. S. C. OMOLO

.....

JUDGE OF APPEAL

A. B. SHAH

.....

JUDGE OF APPEAL

E. OWUOR

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR