



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KWACH, TUNOI & SHAH, J.J.A)

CIVIL APPEAL NO. 124 OF 1998

BETWEEN

JOHN KIPKEMBOI SUM APPELLANT

AND

LAVINGTON SECURITY GUARDS LIMITED RESPONDENT

(Appeal from the Ruling and, subsequent Order of the High Court of Kenya at Nairobi of (Hon. Mr. Justice A. Mboghohi Msaghah) dated the 24th, 1998

in

H.C.C.C NO. 696 OF 1998)

JUDGMENT OF THE COURT

It was pointed out by this Court in the strongest possible terms in the case of Kuria Kanyoko t/a Amigos Bar & Restaurant v Francis Kinuthia Nderu and Others (1988)2 KAR 126, that the power to attach before judgment must not be exercised lightly and only upon clear proof of the mischief aimed at by *Order 38 rule 5* of the *Civil Procedure Rules*, namely, that the defendant is about to dispose of his property or to remove it from the jurisdiction with intent to obstruct or delay any decree that may be passed against him.

In this case there was no suggestion whatsoever by the respondent in the superior court that the appellant was either in the process of disposing of his property or removing it from the jurisdiction of the court with intent to obstruct or delay any decree that may be passed against him.

It is amazing that the learned Judge (Mboghohi Msaghah, J) proceeded to grant the order for attachment before judgment on the ground only that the appellant was a man of straw. We are constrained to reaffirm that even the poorest citizen is entitled to have his day in court. It is quite wrong for any court to put fetters on the right of a defendant to be heard in his defence and an order for attachment before judgment, when wrongly made, may well abridge this right.

In an application under *Order 38 rule 5*, the onus of showing a plausible case for resisting the application can only shift to the defendant once the plaintiff has fully satisfied the requirements under the Order. That was not the case here.

For these reasons, we allow this appeal, set aside all the orders of the superior court made on 24th April, 1998 and substitute therefor an order dismissing with costs the respondent's application dated 25th March, 1998. The appellant will have the costs of this appeal.

Dated and delivered at Nairobi this 3rd day of December, 1998.

R. O. KWACH

.....

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