



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MOMBASA**  
**CIVIL CASE NO 56 OF 1989**

**PETER WAMBUA T/A NEW**

**TAWA TYRE TRADING ..... PLAINTIFF**

**VERSUS**

**RETAIL HARDWARE & SANITARY**

**STORES LTD & ANOTHER..... DEFENDANT**

**RULING**

This is a notice of motion under s 5 (1) of the Judicature Act and under s 3 (A) of the Civil Procedure Act and under order XXI rules 53 and 54 of the Civil Procedure Rules and order L rule 1 of the Civil Procedure Rules. It seeks the following main orders:-

- (a) That Bob Ndirangu of Bareco Traders court Brokers & Auctioneers be brought to Court so show cause why he should not be punished for contempt of court.
- (b) That the attachment of motor vehicle together with its load of sisal be set aside until final determination of the objection proceedings herein.

In my opinion the prayer (a) is dependent on whether prayer (b) is feasible, and is there, for granting. If the applicant does not succeed on the prayer (b) then its prayer (b) will inevitably fail.

Background aspects of the case

The action was began by plaint on the 20th January 1989. In it the claim was for the value of goods sold and delivered. The amount claimed was Shs 132,000/=. It was relatively paltry sum. In a defence which was delivered on the 13th of February 1989 the defendant basically denied its liability to the plaintiff as alleged in the plaint. But it made a set off and counterclaim for Shs 45,000/= being in respect of 6 defective retread tyres valued at Shs 30,000/= and in respect of 15 casigs valued at Shs 15,000/=.

From the defence it is easy to infer that there had been a business transaction between the parties; but whether the defendant had fulfilled its contracted obligation to the plaintiff was the question which should have been agitated at the trial.

On the 1st December 1992 the plaintiff filed a notice of motion in which he sought summary judgment to be entered for him against the defendant. The defendant failed to file its replying affidavit and grounds of opposition to this motion. On the 8th February 1993 the plaintiff's advocate Mr Kenzi, appeared before me and was able to establish that although the notice of motion had been served on Mr Abdullah, the

defendants advocate who was then on record, there had been no replying and grounds affidavit as mandatorily required by order L rule 16 (1) of the Civil Procedure Rules.

Rule 2 of order L provides.

“If no affidavit and no statement under sub rule 1 is filed an order may be made on the application *ex parte*.”

I accordingly gave summary judgment to the plaintiff as prayed in the plaint. There was no attempt by the defendant at all to set aside that judgment. In the ruling given on the 17th November 1993 Mbaluto J held that Nalish Ambalal Patel and his co-director had intended to defraud the plaintiff and deny him the fruits of judgment by causing the defendant company to be dissolved and then dissipate its assets. He went on to hold:

“Clearly by the time Patel ceased to be director of the Company (the plaintiff) judgment in favour of the plaintiff had already been entered.”

The log book exhibited in the proceedings show the lorry KYG 958 had initially been the property of the defendant Company before it was transferred to the objector. It is pertinent to note that the objector was incorporated for the reasons stated in the ruling of Mbaluto J. It follows that transfer of the vehicle into the name of the new company was part of the director’s scheme in their bid to defeat the claims of creditors of the plaintiff. In view of the ruling of Mbaluto J the objection proceeding were a futile exercise. Unless the directors of the objector, who had been parties to the application which culminated in that ruling, succeeded on appeal and had that ruling set aside I am bound to find and hold that objection against the attachment of the vehicle was a mere waste of time.

The effect of order XXI rule 55

Order XXI rule 55 says that if the attaching creditor intimates to court that he proposes to proceed with the attachment the Court is mandatorily required “by notice in writing” to direct the objector to take proceedings to establish his claim within 10 days or such other period as it may direct.”

Mr Abdullah’s affidavit is sufficiently exhaustive on the crucial events relating to the objection. The attaching creditor intimated the intention to proceed with the attachment on the 3rd of November 1993.

If rule 56 was adhered to the objector’s claim would have been established before expiry of 10 days from that date. That would bring the deadline to 14th November 1993. That is the date when the requirements of rule 56 should have been fulfilled. But this was not done. Mr Abdullah sought to blame the Court. He said the notice should have been issued by the Court. I agree with that submission. But I think that a diligent advocate is under duty to move the court on aspect like that. Mr Abdullah should have drawn the Deputy Registrar’s attention to the requirement of that rule. He should also have proceeded to file and serve the summons and affidavit as required by order XXI rule 57. That is the only summons which would have operated as a stay. But it is clear that the attaching creditor was entitled to proceed with the attachment once a copy of the notice under order XXI rule 56 was not served upon him and after the 10 days expired before the objector had established its claim.

Upon the foregoing I hold that court broker in selling by auction the attached motor vehicle on the 23rd of November 1993 did not offend any rule. Clearly, there was valid stay of the attachment.

And because the objection was sham ( for reasons given by Mbaluto J in the ruling adverted to ) it follows that the sale can not be set aside.

Accordingly the application is dismissed with costs.

Dated and delivered at Mombasa this 6<sup>th</sup> day of December 1993

**I.C.C. WAMBILYANGAH**

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**JUDGE**