



IN THE COURT OF APPEAL

AT KISUMU

(Coram: Gachuhi, Gicheru & Tunoi JJ A)

CIVIL APPEAL NO 170 OF 1991

NAFTALI ONCHWERI NYANGWACHI APPELLANT

VERSUS

MESHACK OSIEMEO NYAGWACH

ELIJAH M. MANWAI

KEPHER OKUNDI

PAVE AUCTIONEERS.....RESPONDENT

JUDGMENTS

Gachuhi JA: Naftali Onchweri Nyangwachi (the appellant) a Kenyan citizen residing in the United States of America since 1971 returned to Kenya for the first time in December, 1987. He brought with him a used vehicle, Honda Accord IX chassis number JHMAD 543 ECO 10271, engine number 1508686 – 1800 cc. For the purpose of custom duty, its value was assessed by Honda Doughty Ltd at Shs 380,000/- but because the vehicle was for personal use no duty was paid. The vehicle was registered by the Registrar of Motor vehicles in his name on 9th March 1988 and allocated registration number KYX 381. He got it comprehensively insured with Blue Shield Insurance Company Limited. When he returned to America he left the vehicle and its log book with his brother, Elijah Manduku Manwa (Elijah) (the second respondent) with specific instructions to take care of it. Elijah was permitted to keep the vehicle regularly insured and licenced and to use it in supervising the appellant’s farm at Molo.

In a civil suit between the appellant’s two brothers before the Resident Magistrates Court at Kisii in Civil Suit No 335 “A” of 1985, Elijah sued Meshack Osiemio Nyangwachi (Meshack) (second respondent) for trespass of Meshack’s cattle to his farm which damaged his maize crop. Meshack was ordered to pay Shs 4,000/- as compensation and costs of Shs 500/-. Meshack appealed to the High Court at Kisii and his appeal was allowed with costs on 7th December, 1988. Elijah filed a Notice of Appeal to the Court of Appeal of Kenya on 20th December 1988. Meshack through his advocate taxed the bill of costs *ex-parte* on 4th May, 1989 at Shs 17,617/-. After taxation, execution steps were taken expeditiously through an application by attachment and sale by public auction of the judgment debtor’s movable property in default of payment of the decretal amount and costs. The address of the judgment debtor was given as:

“Elijah Manduku Manwa

Nyaribari Central Location

Gesabakwa

Chitago Primary School

PO Box 130 Keroka”.

The warrant of attachment was served on Pave Auctioneer Sanzora Building PO Kisii on 9th May, 1989 for execution to recover Shs 19,492/-. The warrant was returnable on 9th June 1989 but the date appears to have been altered without authority to 12th October, 1989. In the meantime an application to set aside *ex-parte* taxation had been filed and was awaiting determination. *Ex-parte* taxation was eventually set aside on 4th October 1989.

On 21st June, 1989 the court broker went to Elijah’s residence at Kisii when he was told that Elijah was staying at his place of work at Njoro in Nakuru district. The court broker then went to Njoro accompanied by his driver and two police officers to execute the warrant of attachment. He said he wanted to attach motor vehicle KYX 381. Elijah told the court broker that the vehicle was not his but belonged to his brother who was in the USA. Elijah resisted the attachment and offered his properties consisting of a Land Rover KTH 853 his TV and video but the court broker refused and insisted on attaching KYX 381. Elijah was threatened with arrest by the two police officers unless he handed over the ignition key of KYX 381 which he obliged and signed some papers and the vehicle was driven away. In Kisii at the address given in the execution application Elijah had a well stocked hardware shop and a mini bus KXX 790 which the court broker should have proceeded against. Elijah then informed the appellant on telephone regarding the attachment of the vehicle. Thereafter the appellant instructed an advocate in Nakuru to institute objection proceedings.

It is worth noting that the execution in this case was not at the address given in the execution application but at another place in another district of another province. The goods intended to be attached were neither specified nor was there an indication given in the warrant how these goods will be pointed out to the court broker and by who. It is not certain how the court broker was to determine the goods of the judgment debtor if they were not at the address given.

Pave Auctioneers must have been licensed to carry out its business under a licence issued by the Court Brokers Licensing Board under the Court Brokers Act (Cap 20), the Act, a court broker is defined as follows:-

“Court broker means a person who carries out, or who purports to carry out, the functions of attachment and sale of property under an order of a Court, but does not include a bailiff certified under the Distress for Rent Act.”

For all intent and purposes, a court broker must comply with the Act and the Rules made thereunder and the terms and condition of the licence, section 12(1) of the Act provides:

“12 (1) A licence shall be in the form to be determined by the Board and shall include:-

(a) -----

(b) -----

(c) the district or districts to which the licence applies;

(d) -----

From this provision the court broker is licensed to operate within a certain area to avoid overlapping with the area of operation of another court broker in another district. If a court broker wishes to attach property

outside his own area of operation, he must obtain a specific order from the Court issuing the warrant otherwise the warrant should be sent to a court broker where the attachment is to be effected. In the present case, it does not appear in the court file that such an order was obtained to authorize the court broker to go to Nakuru district, nor is there any indication that the latter district was included in the relevant licence. For this reason the warrant of attachment may not have been validly executed. The court broker is required by the rules under the Act to inform the Court of the value of the property attached. Rule 22 (1) of the Court Brokers Rules provides that:

“A court broker shall, not later than seven days after the execution by him of an order of a Court, deliver to the Court that passed the order to him, to the judgment creditor or his advocate and to the judgment debtor:-

(a) an itemized inventory of the property attached showing the value he places upon such an item, and

(b) details of his charges.”

There is nothing in the court record to show that the court broker complied with this rule. In his own evidence in Court he admitted having complied with rule 21(1) as to of obtaining a signature from the judgment debtor but does not state that he complied with rule 22(1). He could not therefore dispute the value of the car he attached to be Shs 380,000/- since he never complied with this rule and never gave his valuation of the car before he sold it or prepared an inventory.

The events that followed the attachment stated above indicate that the court broker was determined to attach the vehicle KYX 381 which was of a much higher value than the debt of Shs 19,492/- which was to be recovered. The court broker could have recovered the value of the attachment by attaching Elijah's movable goods from the hardware shop at Keroka or by attaching the minibus KXK 790 which could have also been of a higher value rather than travelling to another district using the assistance of law enforcing agency to attach an expensive car.

Notice of objection to be attachment under order XXI rule 53(1) of the Civil Procedure Rules (Cap 21) was given by the appellant and filed on 5th July, 1989 with a detailed affidavit together with annexures which bore out the appellant as the owner. The annexures consisted of shipping documents, registration documents, passport, valuation documents, customs documents, motor vehicle insurance policy and the motor vehicle log book. The filing of this notice did not only raise the objection but produced all the documents that were required to prove ownership. The same documents were relied upon during the hearing of the application. Even at the time of sale, the court broker knew who the owner of the attached vehicle was. Notice under order XXI rule 56 was sent to the appellant's advocate at Nakuru by post which arrived late with only two days left to file proceedings, but the copy copied to the attaching creditor was sent by hand delivery and received on the same day. Though the pleading in the application was sent to an agent at Kisii for filing, it was not filed on time until very late after the expiry of the 10 days limit. There was no application made for extension to time to file the proceedings. Although the advocate for the judgement creditor had been aware that the documents establishing ownership had been filed, he applied to Court for leave to sell the vehicle by public auction. A letter from Court to the court broker was delivered by hand but a copy meant for the appellant's advocate was sent by post to the wrong address. For that reason the appellant's advocate did not know of the Court's order to sell the vehicle on time to enable him to proceed with an application for stay pending the hearing and determination of the application which had already been filed. Although proceedings were filed out of time on 13th September, 1989, and served on the same day, order XXI rule 57 (3) provides that a summons under this rule shall operate as stay of attachment unless the Court otherwise orders. There was no order made by the Court after filing the Chamber Summons. The vehicle was sold on 16th September 1989 without any advertisement and if there was advertisement no fee was paid for the same. The court broker issued proclamation for sale on 6th July 1989 but no proclamation was issued for the sale on 16th September, 1989. If proclamation could be taken as advertisement, which I do not accept to be so, it could have been displayed in a conspicuous place. Advertisement could be in the newspapers or by other means displayed in conspicuous places in Kisii township. The objection proceedings were dismissed by the superior court

giving rise to this appeal.

The superior court found as a fact that the advocate for the respondent filed the Bill of Costs and had it taxed *ex-parte* before drawing the formal decree. He then applied for the issue of warrant of attachment of Elijah's movable property on 9th May, 1989 for the recovery of costs. The execution process led to the attachment of the appellant's motor vehicle No KYX 381.

The conduct of the court broker outside Kisii district was challenged that he used the assistance of security enforcing personnel (police officers) who pressurized Elijah to surrender the ignition key of the car inspite of his protest that the vehicle was not his, the learned judge made no finding of the use of this force or even referred to it in his ruling. Similarly he made no comment on Elijah's evidence that he offered the court broker his Land Rover, TV and video at Njoro and his goods at the shop and his mini bus at Keroka. No doubt Elijah had been seen using the attached car and the court broker must have been adamant in attaching only this valuable vehicle and not other items offered to him. Why did the court bailiff insist on attaching this vehicle and what made him believe that it belonged to Elijah? This is an unexplained puzzle. It appears that the superior court failed to realize that the execution may have been levied outside the jurisdiction of the court broker.

The superior court found from the documents produced to it that the vehicle was registered in the name of the appellant and also relied on the log book as *prima facie* evidence of ownership. This is in compliance with the provision in section 8 of the Traffic Act (Cap 403) tpat:

“8 The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.”

But the learned judge never made a finding whether or not the said vehicle, inspite of the evidence of ownership, could have been legally attached for debts of Elijah who was a mere bailee. The judge relied on the notice issued under O 21 rule 56 and held that since the appellant filed the proceedings out of time, the attachment was proper and dismissed the objection proceedings. On the facts stated by the learned judge that the ownership of the vehicle attached was in the appellant, in the interest of justice, the learned judge should have allowed the application and stop the sale and should not have sanctioned the attachment since this information was before the Court before the notice under rule 054 was sent to the advocate for the judgment creditor.

Regarding the act of the court broker, on my part, I feel that the court broker acted with malice. The court broker was to execute the warrant at the place directed in the application, ie at Keroka. At that address, he could have attached goods to cover the execution debt of approximately Shs 20,000/- including his costs. The court broker could have attached the mini bus KXX 790 which was owned by Elijah. The vehicle attached was not directed to be attached in the warrant of execution otherwise its registration number could have been given and it was not at Keroka, at the address given. The question now to ask is on what basis did the court broker move from Kisii to another district to effect the attachment? A vehicle is a chattel with its title the log book and whoever attaches a vehicle must ensure before seizing it that in all respects it belonged to the judgment debtor. It does not appear that the court broker ever demanded its log book to be produced or handed over to him to ensure that it was registered or that it belonged to the judgment debtor. If he made that enquiry then that evidence is not available in the Court record. There is also no evidence to show that the court broker was directed by the judgment creditor to go to Njoro and that the judgment creditor pointed out the vehicle to the court broker. There should have been evidence to the contrary that the vehicle did not belong to the appellant but belonged to Elijah and that it was legally liable to attachment.

It was held by this court in *Thomas Okwany Atogo v Agricultural Finance Corporation and another* CA No 165 of 1989 (unreported) and in *Ernest Orwa Mwayi (objector) vs Victoria Enterprises Ltd.* (plaintiff) CA No 14/91 (unreported) that it was wrong to attach a motor vehicle whose ownership was in the name of a person who is not the judgment debtor and it is an actionable trespass wrongfully to set the law in motion so that the wrong goods are seized or the wrong person is arrested. It was also held by this Court in *Ernest Orwa Mwayi vs Victoria Enterprises Ltd* that contrary to the particulars shown in the log book,

it was proved that there was a sale agreement entered into followed by the payment and the delivery of the vehicle and the delay in registering the transfer to show the name of the objector in the log book was due to the financier's delay in completing the transfer form before the attachment was executed. The attachment was then held to be wrongful.

The other point for consideration is that a Land Rover or TV with video if sold would have covered the decretal amount. If not guided by malice, why should the court broker attach a vehicle worth more than Shs 380,000/- for a debt of Shs 19,492/-. How can the court broker justify this?

Having considered the evidence before the learned judge and the submission before us, there is no doubt that the attachment and sale was wrongful. Mr Masese who acted for the decree holder conceded that order 21 rule 57(3) operates as a stay and that he did not draw the attention of this provision to the court so as to stop the sale. He also conceded that he acted on instruction from his client that the vehicle belonged to the judgment debtor without having a certificate of search obtained from the Registrar of Motor Vehicles. On my part this will not exonerate counsel from this mess. Mr Masese is an officer of the Court and was duty bound to assist the Court. On being served with the proceedings and other papers showing clearly that the ownership of the vehicle was in the appellant, he should have realized that the attachment was wrongful and he should have instructed the court broker to stop the sale as he was in a position to do so having nominated him in his execution application. Even if the court broker received the court pleadings, it was up to the advocate to advise him to postpone the sale. It is grossly wrong for an advocate to submit that the sale was not proper while he allowed the attachment and sale to proceed when he was in a position to stop it. The advocate misled the Court. The whole process of execution was nullified when taxation was set aside, but great damage had already been done at the behest of the advocate.

Mr Siganga who appeared for the interested party (the purchaser) at the hearing of this appeal also conceded that the attachment was wrongful.

Mr Maraga who appeared for the appellant argued all four grounds of appeal together and asked the Court to rule whether the attachment was proper. There is no doubt in my mind that the appellant was the owner of KYX 381 at the time of the attachment and it was not at the address the attachment warrant should have been executed and for the reasons stated above, the attachment was wrongful. Equally the sale which was concluded while the objection proceedings were also in Court was unlawful. In the circumstances I would allow this appeal with costs against 1st, 3rd and 4th respondents jointly and severally. I would set aside the ruling of the High court and substitute therefore an order allowing the objection proceedings setting aside the attachment and sale of KYX 381 with costs against the 1st 3rd and 4th respondents.

As Gicheru and Tunoi JJ A also agree, that the attachment and sale of vehicle KYX 351 was unlawful the appeal is allowed with costs.

Gicheru JA. I have had the advantage of reading in draft the judgment of Gachuhi JA I agree that this appeal be allowed on the term proposed therein.

Tunoi JA. I have had the advantage of reading in draft the judgment prepared by Gachuhi JA.

I agree with it and do not wish to add anything.

Dated and Delivered this 26th day of October, 1993

J.M. GACHUHI

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JUDGE OF APPEAL

J.E. GICHERU

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JUDGE OF APPEAL

P.K.TUNOI

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JUDGE OF APPEAL