IN THE COURT OF APPEAL

AT KISUMU

(CORAM: Hancox, Platt & Gachuhi JJA)

CIVIL APPEAL NO. 94 OF 1986

BETWEEN

ARONI SURE .....1ST APPELLANT

NEFTALI O KEBAIS .....2ND APPELLANT

THOMAS MARANGA.....3RD APPELLANT

JAPHETH GWONDA..... 4TH APPELLANT

HENRY ONDIEKI .....5TH APPELLANT

JUSTUS MATUNDURA .....7TH APPELLANT

DELILAH BOSIBORI TUMBO.....8TH APPELLANT

GILBERT AGECHA .....9TH APPELLANT

AND

GESARE NYAMAIKO.....DEFENDANT

(Appeal from a Judgment of the High Court at Kisii, Masime J)

JUDGMENT

April 29, 1988**, Hancox JA** delivered the following Judgment.

As a result of a civil action in High Court Civil Appeal 47 of 1977 at Kisii, between Gesare W/O Nyamaiko, who was referred to as the plaintiff, and two brothers, David and Kengere Mayaka who were referred at as defendants notwithstanding that the proceedings were said to be by way of an appeal) execution proceedings were taken by Daniel Nyamau, who was the plaintiff's grandson, and presumably her legal representative after her death, against the two brothers. When they failed to satisfy the decretal sum of Kshs 5,283.15 an application for attachment of their movable property was made, and on the 13th December, 1980, Daniel Nyamau accompanied by the court broker, one Richard Muchai, and some police

officers, descended on a village in the Kisii District and attached several cattle and other goods, all of which were listed in the proclamation of the same date and issued by the court broker under order 21 rule 61 of the Civil Procedure Rules. I refer to it as "a village in the Kisii District" because there was a conflict of evidence as to whether the attachment took place at Amaariba village (where the two defendants lived) or at Matunwa village, where the applicants, who were originally the objectors to the attachment, are said to have lived.

This conflict of evidence as to where the attachment took place has persisted even into this Court, and since there was evidence that the two villages were about two and a half miles apart, Mr. Osoro, who appears for all the appellants on this appeal, strongly submitted that the findings of the deputy registrar in the objection proceedings that the attachment took place at Matunwa was wrong, in view of the clear evidence from the judgment creditor that the animals

> "were found on Land Parcel No 1070 at Amariba near the cattle dip and the home of David Mayaka."

Mr. Osoro equally complained of the finding of the learned judge, from whom this appeal is brought, which was to the effect that Mr. Osoro's submissions in the High Court as to the importance of the geographical location of the attachment were brushed aside as "immaterial", the judge saying

> "in my view what was an issue in this case was the ownership of the property that was attached."

Mr. Osoro said that the failure by both the lower courts to resolve this question meant that neither could have arrived at a credible finding as to the ownership of the movable property concerned.

Unfortunately neither of the defendants (and original judgment debtors) was called in evidence as a witness before the Deputy Registrar, but, nevertheless, Mr. Osoro said, "the judgment creditor was likely to have been an impartial witness, at least as between the judgment debtors and the objectors, and his evidence as to where the attachment took place should therefore have been given adequate consideration.

The importance of a clear finding on this issue is that it would have resolved the question as to whether the judgment creditor and the court broker proceeded to the premises of the judgment debtors and attached their property in accordance with the warrant of attachment dated the 23rd September, 1980, or whether, in disregard of the warrant of attachment, (whether at the instigation of either of the parties to the original case or not) they proceeded to a different place, and then took possession of the wrong property belonging to persons who were not involved in the original action, as happened in *Blassio Simiyu v Vincent Wanjala Sinino* 1985 3 KCA 211. The resolution of this question was thus central to all the other questions in the case.

Of the cattle attached, according to the appellant's affidavits supportingtheir respective claims under order 21 rule 53, seventeen belonged to appellants/objectors 1 to 6, and four were stated in evidence to have belonged to the appellants 7 to 9, and not to the judgment debtors. The judgment creditor, Daniel Nyamau, however, did not realize this until the party had travelled about fifty yards from where the cattle were attached, when he sought to return these four extra cattle. At that stage the rest of the crowd intervened and prevailed upon those present not to accept the return of the four cattle unless all the cattle attached were returned to them. Obviously this was impossible, and so they were all taken away.

The four cattle which, admittedly, did not belong to the judgment debtors/defendants, were returned to their owners ten days later on the 23rd December, 1980. This resulted in objectors 7 to 9, Justus Matundura, Delilah Bosibori Tumbo and Gilbert Agecha having to share the court broker's fees of Kshs 710. This formed the basis for the second portion of the claim in the chamber summonses issued by all the objectors on the 20th March, 1981, seeking the raising of the attachment on the thirteen head of cattle remaining with the court broker.

I observe at this stage that though the total of the cattle mentioned in the respective notices of objection

amounts to seventeen, the number of cattle stated to be attached in the proclamation is nineteen, and this accords both with the details set out in the Deputy Registrar's Ruling on the objection proceedings dated the 13th June, 1984, and with the evidence of the judgment creditor, Daniel Nyamau. It is difficult, when comparing the details of the cattle, to discern which were the two additional ones which were not the subject of an objection by the individual appellants, but one of them would appear to be the brown and the white small bull appearing as item 6 in the Proclamation. A further discrepancy emerges when these lists are compared with that set out in the letter from the advocate, appearing for appellants 4 and 6, Mr. James Nyamweya, dated the 15th December, 1980. Only fourteen cattle are there specified, which, moreover, are only stated to belong to two of the objectors (four being attributed to Henry Ondieki and ten to Japheth Gwonda) whereas these are split up individually in nine of the Notices of Objection filed the following day, that is to say the 16th December, 1980.

These discrepancies are referred to in paragraph 5 (c) of the appellant's first Memorandum of Appeal to the High Court, and the point is additionally taken that it was self-evident from the proceedings that there had been a misdesription in the cattle to be seized, because the four cattle belonging to objectors Justus Matundura, Delilah Bosire and Gilberty Agecha were included, and yet almost at the very moment of seizure the judgment creditor, that is to say Daniel Nyamau, "remembered" that those four did not belong to the defendants, with the result I have already stated.

If there was an error in the number of cattle pointed out by the judgment creditor, amounting to nearly one quarter of those seized, then I find it strange that the learned deputy registrar who determined the objection proceedings should say, as he did in the ruling

> "The respondent/decree holder Daniel Nyamau, as it has clearly transpired in evidence, is a man who knows each of these objectors very well.
>
> He has given evidence on oath and from his testimony I have been left in no doubt at all that on the 13.12.80 when he led the court broker and his team into the home of David Motuka Mayaka (PW 3) the judgment debtor at the Matunga village, he the (respondent) had done a thorough research and he knew where exactly to take the Court Broker for the property of the J/D"

He then proceeded to dismiss the claim of appellant No 10, Silvanus Ogega, (who was the only one whose objection related to items other than cattle) to tables, chairs and iron sheets valued at Kshs 4,880/40, because he found that there had in no effect been collusion between the judgment debtor and the objector, which led the latter to claim those items as his.

The first judgment debtor, David Mayaka was also regarded as an unreliable witness by the Deputy Registrar who said of him:

> "David Motuka Mayaka (PW 3) who is the judgment debtor was placed in the witness box by Mr. Osoro soon after the testimony of Mr. Japheth Gwonda (no.4) Motuka was an important witness in this case. As a witness David Motuka Mayaka impressed me as most unreliable. He was a man who came here with a closed mind to deny everything that may suggest that any of the properties attached belonged to him."

Finally the Deputy Registrar felt that none of the other Objectors could be believed, and he dealt with their evidence collectively as follows:

> "The whole nature of the case for each objector is such that it gives you an impression from the very day of the attachment ie 13.12.80 to the date each appeared in the witness box, of a village which sat down, planned a false case, assigned people to properties that were not his and asked each to come here and file and objection, all in my opinion, in a conspiracy to defeat the course of justice.
>
> In my judgment each of the objectors' case is a fabricated claim to attempt to save the property of

their kinsman David Motuka Mayaka."

He then dismissed all the objections and held, accordingly, that the movable properties which were the subject thereof (with the exception of objections 7 to 9) had been rightly attached by the Court Broker.

While the Deputy Registrar did mention the evidence of the individual objectors, particularly that of Japheth Gwonda, No 4 and Henry Ondieki (No 6), he did not, in my view, give individual treatment to the testimony of each of them, as he should have done when assessing their credibility on the balance of probabilities. It therefore seems to me that there is justification for the appellants' complaint in ground 4 of their joint Memorandum of Appeal to the High Court that:

> "the learned Deputy Registrar erred in not considering the case of each of the appellants and deciding the same according to law, giving reasons therefor."

This led to the complaint in the Memorandum of Appeal to this Court that the learned first appellate judge had erred in accepting the Deputy Registrar's findings of fact without himself evaluating the evidence of each objector, as he should have done on a first appeal. As was said in *Peters v Sunday Post Ltd* [1958] EA 424, at P 429 by O'Connor P.

> "An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand".

The test in deciding whether to uphold the trial court's conclusions on fact is set out in the quotation from Lord Simon's speech in *Watt v Thomas* [1947] AC, 484 at p 485 as follows:

> "….an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but his jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide.
>
> But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight…"

In the instant case it was in my opinion eminently necessary for the judge to re-evaluate the evidence of the individual objectors, but he was hampered in doing this because the Deputy Registrar had not done so at first instance. Indeed he seemed to condone the collective treatment of the objectors' evidence, for he said:

> "The learned Deputy Registrar considered all this evidence and he came to the conclusion that it was all a fabrication made with a view to assisting the judgment debtor against the attachment which was levied against him".

He then said that he had himself considered this evidence against that of the decree holder and had reached the same conclusion as the Deputy Registrar. He continued by saying that it had been alleged that there were improbabilities, contradictions and untruths by the respondent (meaning the original plaintiffs representative), but that it was "not unusual" that there should be such contradictions, that these were "not material" and"neither had they occasioned injustice".

Mr. Achayo who appeared for the respondent on this appeal, as he did in the objection proceedings and in the first appeal, has submitted that taking all the contradictions in the evidence, the evidence itself, and the demeanour of the witnesses into account, the lower courts' findings that the cattle stated in the Proclamation (except the four belonging to objectors 7 and 9) were justified and should be supported.

Moreover it was perfectly obvious, he said, from the fact that Mr. Nyamweya had written the initial letter before action stating that the cattle belonged as to four to Henry Ondieki, and as to ten to Japheth Gwonda, coupled with the fact that only a day later the objectors took proceedings in relation to the cattle individually, that the initial objection was taken by only two persons and that the cattle were later apportioned amongst all the objectors.

I agree that there is some force in this submission, but having taken that and Mr. Achayo's references to the various passages in the record into account I consider that the passages from the learned judge's judgment on the first appeal that I have set out do not amount to a sufficient reevaluation of the evidence of the individual objectors, or of the judgment debtors', or of the decree holder, such as should take place on a first appeal, particularly where it was apparent that the Deputy Registrar had not given adequate individual treatment to evidence of the objectors.

Moreover, I consider Mr. Osoro was right when he submitted, on behalf of the appellants, that the resolution of the conflict on the evidence as to where the attachment took place (at Matunwa or at Amariba) was central to a finding of fact as to the correctness or otherwise of the attachment, and as to the credibility of the witnesses.

With the utmost respect, I cannot agree with the learned Judge's conclusion that the location of the attachment was immaterial, and on that ground alone I would be inclined to allow this appeal, insofar as it relates to the objections of the first six appellants.

I therefore turn to the case of appellants 7, 8 and 9. There can be no doubt, in my view, that the four cattle belonging to these appellants were wrongfully attached, and this was realized almost immediately the attachment had taken place. The Deputy Registrar recognized this but attributed the inability of the Court Broker to return those four cattle to the fault of the Judgment Debtor, David Mayaka, in refusing to retake possession of them, or to sign for those attached on the proclamation.

The Deputy Registrar said, however, that it was the "unnecessary state of tension" which caused the Court Broker to drive the four cattle in question, with all the others, to Kisii, that he was entitled to his charges therefore and that he "saw no reason why I should make the respondent/Decree Holder responsible." He accordingly dismissed their claim for the costs consequent on the wrongful attachment, and this finding was upheld by the learned judge who said

> "these appellants who were present rejected" (the court broker's) "offer to release the animals"

With respect there was no evidence that it was the appellants 7 to 9 who rejected the Court Broker's offer to return the four cattle. The court broker said he asked the people'"who were around" if they could take back the four animals, and they insisted that all should be returned. He does not appear to have been asked which of the people said this, still less if it was the appellants 7 to 9 or any one of them.

The Court Broker said he found it odd that the judgment Creditor had first pointed out the four animals to him, as being some of those to be attached, and this should certainly have put him on inquiry. But far stronger is the evidence of Daniel Nyamau who said:

> "The animals were attached during my presence and driven to Kisii. The Court Broker attached them on my instructions. I knew that 4 did not belong to the judgment debtor. I even informed the Court Broker there and then that on 4 h/c did not belong to the J/D. The 4 animals were also attached and brought to Kisii. I was present when they were being attached."

The underlining is mine.

In those circumstances it seems to me impossible to hold otherwise than that the four cattle belonging to the appellants 7 to 9 were wrongfully attached, that both the Court Broker and the decree holder knew

this, and that these appellants are entitled to their reasonable costs occasioned by that wrongful attachment. Their claim in this respect is expressed in paragraph 3 of the chamber summons taken out by the first nine appellants on the 20th March, 1981. Only two of the three testified in the objection proceedings and neither gave evidence of the expenses he or she had incurred, but the court broker said that they paid his charges of Kshs 710. That is the amount, then, in the absence of any other claim, or any other evidence, to which I would hold that the three appellants Nos 7 to (are entitled if their cause of action is established).

In the case of *Blassio Simiyu v Vincent Wanjala Sinino*, Civil Appeal 108 of 1984, Vol 3 KCA 211, this court, basing itself on several authorities, held that a Court Broker is completely protected in respect of his acts in executing a warrant of attachment, under section 6 of the Judicature Act cap 8, provided they were in respect of the property of the person against whom, according to the warrant, it was directed to be executed. The court also held that to set proceedings for execution and attachment of property in motion wrongfully was actionable as the tort of trespass, and that the defendants in that case (one of whom was the respondent in this Court) were liable in damages to the appellant.

In *Blassio Simiyu's* case the proceedings were began by summons and plaint in the usual way, and the property attached was not that of the unsuccessful plaintiff, Dorcas, but of her father. We held that by inserting in the application for execution the name of the wrong person, or by directing the Court Broker to the wrong house, or pointing out the wrong goods so that the Court Broker was misled into attaching the wrong property rendered the instigator liable in damages for trespass to goods. The clear authority for this was *Morris v Salberg* (1889) 22 QBD, 614.

In the instant case the Decree Holder, the respondent's legal representative said explicitly that the Court Broker attached the cattle, including the four in question, on the instructions and that he knew that the four cattle did not belong to the Judgment Debtor. Though we held in *Blassio Simiyu's* case that it was not essential to establish malice to succeed in an action of this nature the foregoing comes very close to showing that malice existed on the part of the Decree Holder. At all events he knowingly misled the Court Broker.

In those circumstances there is clear authority for us to hold that the seventh, eighth and ninth appellants are entitled to succeed and to recover damages for the unlawful attachment of their four cattle, as to one in respect of Justus Matundura, one in respect of Delilah Bosibori Tumbo, and as to two in respect of Gilbert Agecha. Unfortunately they did not, as the appellant Blassio Simiyu did, make any claim for general damages. Whether this is possible on the objection procedure, as opposed to a plaint, in view of the terms of order 21 rule 60 (2) of the Civil Procedure Rules, it is not essential for us to decide. But , at all events, I would allow the appeals of appellants seven eight and nine. I would set aside the judgment of the High Court and the Ruling of the Deputy Registrar, and substitute therefor an order that the respondent pays them Kshs 710 jointly and severally. I would also give them the costs of this appeal, of the High Court appeal and of the proceedings before the Deputy Registrar. As Platt and Gachuhi JJA agree it is so ordered.

I accordingly return to the case of appellants one to six. The reason for my disagreement with the two lower courts in these cases are different. It was not necessarily because their cattle <u>were</u> wrongfully attached, but because the <u>findings</u> that they were not were based on that which was, in my judgment, defective treatment of the evidence, and the failure to appreciate the importance of the geographical location at which they were they were seized. For these reasons I would ordinarily order that the case be remitted to the Deputy Registrar with directions to reach a conclusion on the evidence as it stands. As this is not now possible, I see no alternative but to order a new trial of the cases of appellants one to six, with a view to a proper assessment of their individual evidence. As Platt and Gachuhi JJA agree it is so ordered. I agree with Platt JA that they should have the costs of their appeals and those in the High Court and that the costs of the objection proceedings should be costs in the event of a new trial.

The only remaining appellant, Silvanus Ogega, No 10 is in a different category. In this case the Deputy Registrar did make a specific finding on his evidence, and there was therefore a proper assessment of it. Though he did not wholly believe the Judgment Debtor, David Mayaka, he held that this appellant's

claim was a false claim. Despite the defective assessment of the other appellant's evidence, I do not think this finding is tainted or vitiated thereby. I would uphold the dismissal of the objection by the Deputy Registrar, and its confirmation, even though brief, by the learned judge. I would therefore dismiss the appeal of appellant No. 10, Silvanus Ogaga, with costs. As however Platt and Gachuhi JJA think differently, the order in his case is that appeal be allowed, and that his case be reheard, as proposed by Platt JA.

The appeals of appellants one to ten are therefore allowed with the results I have stated.

Orders accordingly.

Platt JA. I have had the advantage of reading the judgment of Hancox JA in draft.

I agree that the appeal must be allowed in the case of the objectors Justus Matundura (appellant No 7), Delilah Bosibori Tumbo (appellant No 8), and Gilbert Agecha (appellant No 9) and with the orders proposed by Hancox JA in respect of their appeals.

I also agree that the appeals of Aroni Sure (appellant No 1), Neftali O Kebais (appellant No 2), Thomas Maranga (appellant No 3), Japheth Gwonda (appellant No 5), and Henry Ondieki (appellant No 6) should be allowed and a new trial ordered. But I would add the order that these six appellant be awarded the costs of this appeal and the costs in the High Court; whilst the costs of the objection proceedings be costs in the event of the new trial.

Lastly with great respect I would not dismiss the appeal in the case of the 10th appellant one Sylvanus Ogega. I would order his case to be reheard as well, for there is much confusion about it.

His claim concerned his:

> Wooden chairs, 31 corrugated iron sheets, 2 wooden stools, I spotted bull, 1 goat, 1 torch and batteries and cash of Kshs 4,880.40,

in accordance with his notice of objection. In his affidavit he added two wooden tables.

The evidence of both Sylvanus Ogega and his wife Eunice (PW 6) was that there had been three head of cattle at home, and they had all been taken away at he time of execution. Johana Matundura (PW 7) saw the three cattle and one goat taken away.

According to the Decree Holder's representantive, Daniel Nyamau, some 19 cattle was attached. Accordingly to the proclamation twenty cattle were attached, including one black and white goat.

Mr. Osoro who appeared for the first six appellants made the statement at the commencement of the proceedings that items 4, 6 and 7 were alleged to belong to the appellant Sylvanus Ogega (No 10), and items 8 to 23 belonged to the first six appellants. He stated that items 1 to 3 were the property of the judgment debtor, "and no one is complaining". That meant that item 1, the 2 wooden tables, item 2 the wooden stool, and item 3 the four chairs were admitted to belong to the judgment debtor. The trial magistrate pointed out that Mr. Mainye who represented Sylvanus Ogega was present and apparently raised no objection. Hence whether these articles were in the house of Sylvanus, they were admittedly the property of the judgment debtor David Mayaka. The dispute continued, as the Magistrate understood the situation, over the thirty one iron sheets, as well as the brown and white small bull, and the black and white goat.

But during the evidence, the concessions made by Mr. Osoro, were not adhered to. Mr. Mainye allowed his witness to give evidence against the concessions. It was never taken up by the court what the position was then. Mr. Osoro was not acting for Sylvanus Ogega. Sylvanus and his wife did not agree with Mr. Osoro. Mr. Mainye unfortunately, never clarified the issues, and never appeared to make a final address for Sylvanus, and the latter added nothing more.

In my opinion this was an unsatisfactory situation, which the trial court ought to have clarified. The court ought to have required Mr. Mainye to indicate what the issues were at the beginning, and again after Sylvanus and Eunice gave evidence. Certainly Sylvanus and Eunice never felt bound by Mr. Osoro's statement and gave evidence directly against it. It would appear that Sylvanus and Eunice wre let down by Mr. Mainye who never appeared to address the court. In place of Mr. Mainye the court should have asked Sylvanus and Eunice whether they accepted Mr. Osoro's statement and indeed whether he had had any authority from them to make it.

The lack of clarification led to the evidence of Sylvanus being rejected as altogether untrue. His claims about the tables, stool and chairs, having been taken as abandoned, the claims for the corrugated iron sheets, bull and goat were disbelived. But the claims might not have been abandoned.

Moreover as Hancox JA has pointed out there are discrepancies in the lists of the cattle actually attached. Yet item 6 the small brown and white bull was certainly claimed by Sylvanus, who was not only concerned with objects other than cattle.

The High Court did not inquire into this aspect of the case.

For these reasons, the trial was unsatisfactory in the case of Sylvanus, and I would order a retrial along with the cases of the first six appellants with the same consequential orders.

Gachuhi JA. I have read the draft judgments of Hancox and Platt JJA. I agree with the reasons therein stated that the appeal should be allowed:

> (a) In the case of objectors 1 to 6 and 10 as their claims are subject of a retrial, will have costs of the appeal and of the High Court but the cost of the proceedings before the Deputy Registrar, will be costs in the retrial.
>
> (b) In the case of objectors No 7 to 9, they will have costs in the appeal, in the High Court and before the Deputy Registrar. The order for damages is as proposed by Hancox JA.

Dated and delivered at Kisumu this 29th day of April, 1988

A.R.W.HANCOX

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JUDGE OF APPEAL

H.G PLATT

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JUDGE OF APPEAL

J.M. GACHUHI

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JUDGE OF APPEAL