IN THE COURT OF APPEAL

IN KISUMU

(CORAM: HANCOX, PLATT & GACHUHI JJA)

CIVIL APPEAL NO. 165 OF 1986

BETWEEN

OKELO & ANOTHER .....APPELLANT

AND

OSONGA.....RESPONDENT

JUDGMENT

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

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

In pursuance of a *harambee* drive to collect funds for the local primary school, the School Committee of Kakwara Primary School passed a resolution in September, 1981, that all parents should contribute to the school at the rate of Kshs 200 for a man and Kshs 50 for a woman. The appellants were respectively the Chairman and a member of the school committee, and were charged with making individual collections and thus putting the resolution into effect.

It was not disputed during the hearing before the Second Class District Magistrate at Kisii that the two appellants, acting in pursuance of that which they thought was their duty, went to the respondent's home in Kamagamba location, during the morning of the 12th November, 1981, and in purported execution of that authority took possession of one bull. There was equally no dispute that the animal was the property of the respondent, who was away cutting sugar cane at the time, but the incident was witnessed by his wife Kezia Akinyi who protested at the appellants' action but was unable to prevent them removing it.

The respondent's case at the trial was first that he resided in Siginina sublocation, that he had already contributed Kshs 250 to the Primary School there, and showed them the receipts, that the animal seized was a big bull worth Kshs. 1,000 and not Kshs 320 only, as claimed in the appellants' defence to the suit and in the evidence. Three receipts totalling Kshs 300, not 250, all dated the 12th November, 1981, and signed by the second appellant, were produced in evidence.

The learned magistrate found that the appellants had seized the respondent's bull without colour of lawful authority, or under any written law, that their subsequent actions in selling it were equally unlawful, and he awarded damages of Kshs 1,000 plus interest and costs as prayed in the plaint.

The appellants appealed to the High Court, and the record of the proceedings is a curious one. Concurrently with the appeal there seem to have been proceedings brought in the form of an application

for an injunction under Order 39 of the Civil Procedure Rules, by one Michael Ongoro Okungu, naming the respondent as the decree holder and the two appellants as the judgment debtors. These proceedings were in relation to three animals, none of which are shown in the record to have been the same as the one which the magistrate had found to have been wrongfully seized, but which, according to the Affidavits filed, appear to have been attached at the instance of the respondent as the judgment creditor in purported execution of the decree he had obtained in the Magistrate's court in the instant case.

These were treated as objection proceedings by Schofield J and a stay ofexecution was granted on 24th August, 1984, but as the attempts to reach agreement between the parties proved unsuccessful he adjoured the matter,in effect *sine die,* and the record is thereafter silent as to what happened to the objection proceedings. It is difficult to see why they were included in the record of this appeal.

At all events the two High Court Appeals against the magistrate's decision, numbered as Civil Appeals 26A and 26B of 1982, came before Aganyanya J and Scofield J on the 8th September, 1982 and the 14th February, 1983, respectively, and both were rejected summarily under section 79B of the Civil Procedure Act Cap 21. Yet another application, to set aside the summary rejection and reinstate the appeals (by which time the two appeals had been combined,) came before Masime J (as he then was) on he 30th May, 1985. He reached the conclusion that he had no jurisdiction to entertain it, with the result that it was dismissed with costs. A Notice of Appeal was filed against that decision of 26th March, 1986, and the present appeal before this court, according to the Joint Memorandum of Appeal, is against the decision of Masime, J, and not against the earlier summary rejections by Aganyanya J and Schofield J (even though the cover of the record mentions the name of the Aganyanya J and not the date of his decision).

I therefore consider that this court has no alternative but to deal with this as an appeal against the decision of Masime J dated 30th May, 1985, and, accordingly, the short point for our determination is whether Masime J was right in saying he had no jurisdiction to entertain the application to reinstate the previously dismissed High Court appeals.

Some of the grounds in the Memorandum of Appeal appear to be more appropriate to an appeal against the summary rejections of the first appeals, which this court said in *Peter Nzioki and another v Aron Kivuva Kitusa*, Civil Appeal 54 of 1982, is a jurisdiction which should be sparingly exercised. In the first ground the appellants' complaint begins by saying that Judge (Masime J) erred in dismissing the application to reinstate or review the summary rejection, and continues;

> "…and yet the appellants or their agents had not been served with Notice or without setting the said appeal to be heard in open Court".

Ground 9 reiterates that the Judge erred in law in rejecting the appeal summarily, and both that and the intervening grounds are complaints against the conduct of the trial and on the merits and demerits of the fund raising exercise which gave rise to it.

That however is not, as I see it, the true issue on this appeal. It may be that appellants have not been legally advised, and would easily misapprehend the nature of the decision against which they are endeavourng to appeal, but the position remains that without a Notice of Appeal this court lacks jurisdiction to entertain an appeal against a decision of the High Court. The only Notice of Appeal in existence is the one against Masime J's decision. There is none against either the decision of Schofield J or of Aganyanya J.

It is therefore the validity of Masime J's refusal to reinstate the earlier appeal which is in question, and ordinarily it is quite impossible for one judge of the High Court to set aside the decision of another judge of equal jurisdiction, whether on appeal, or at first instance. The only such power is if an application for Review, is made under order 44 rule (1) of the Civil Procedure Rules, under which certain conditions have to be satisfied.

It is not clear from the application and supporting affidavits dated 12th February, 1985, at pages 28 and 29 of the record, under which order or rule the application to reinstate the appeal was made. At first sight

it might be thought that the terms of order 44 rule (1) by referring to a decree or order from which an appeal can be brought, (under the definition section in the Act a decree is only passed on the determination of a suit) that only decisions at first instance can be reviewed, and not those on appeal.

However, in the *Peter Nzioki and another v Aron Kivuva Kitusa* (*supra*), the appeal was, against the dismissal of an application for review and not against the original dismissal of the appeal summarily under section 79(B) of the Civil Procedure Act, Cap 21. The court envisaged an application for review either under order 44 or under section 80 of the Act. The Court also said that Order 42 Rule 1 (1) (aa) envisaged an appeal as of right against the dismissal of an application for review. The court, composed of Law and Potter JJA and myself said as follows:

> "Instead of fixing a date for the hearing of the application and again without hearing any argument on the merits, the learned judge proceeded to dismiss the application for review with costs. From this order, the applicants have lodged the present appeal as of right, see order XLII rule 1(1) (aa). The principal ground of appeal, argued before us by Mr Patel, was that the learned judge erred in dismissing the application for review without hearing the parties. M Mervyn Morgan, for the respondent, conceded that there had never been a hearing.
>
> We have no doubt that this appeal must succeed. The 16th March, 1982, was fixed as a date for mention of the application, and not as a hearing date. The application for review has never been heard, and it could not therefore lawfully have been dismissed. We set aside the order of Muli J dismissing that application. We order that the application for review be remitted to the High Court for hearing according to law".

From the foregoing it would appear that the power of review in the High Court is not limited to reviewing decisions at first instance but includes those on appeal. Such a decision is itself appealable under order 42 rule 1(1) (aa). Mr Achayo, for the respondent, supported the judgment of the High Court, and specifically that of Masime J of 30th May, 1985. He also supported the magistrate's decision and asked that the appeal be dismissed with costs. He did not deal with the point to which I have just referred.

For these reasons I consider Masime J should have heard the application for a review. I would allow the appeal, set aside the order of **Masime J** and direct that the application for review be remitted for hearing to the High Court according to Law.

As Platt and Gachuhi JJA agree it is ordered that this appeal be allowed with costs in this Court, but that those in the High Court hearing should abide the event.

Platt JA. I agree and have nothing to add.

Gachuhi JA. I have read the judgment of Hancox JA in draft form. I entirely agree with the reasoned view expressed therein. I have nothing useful to add.

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

A.R.W HANCOX

.....

JUDGE OF APPEAL

H.G PLATT

.....

JUDGE OF APPEAL

J.M GACHUHI

.....

JUDGE OF APPEAL