IN THE COURT OF APPEAL

AT NAKURU

(Coram: Nyarangi, Gachuhi & Apaloo JJ A)

CIVIL APPEAL NO 96 OF 1984

Between

KANYOKO T/A AMIGOS

BAR & RESTAURANT.....APPELLANT

AND

NDERU & 2 OTHERS.....RESPONDENT

JUDGMENT

(Appeal from a Ruling and Order of the High Court at Nakuru, Tunoi Ag J)

October 21, 1988, **Nyarangi, Gachuhi & Apaloo JJ A** delivered the following Judgment.

The appellant who carries on business under the name and title of Amigos Bar Restaurant, appeals against a ruling and order of the High Court, Nakuru (Tunoi, J) dated the September 16, 1987. The Court ordered

> "Court Brokers to attach the moveable properties of the appellant to the value of Kshs 240,000 and keep the same under safe and secure custody until further orders".

The Court also directed that the appellant "meet the Court Brokers

charges". As will appear presently, these charges are not inconsiderable.

The appellant says, these orders were wholly wrong and should be set aside. The orders were not made pursuant to any judgment delivered against the appellant. They were to forestall an alleged attempt by the appellant to make any decree that may be rendered against him infructuous.When then are the facts?

The appellant and one Joseph Mwago were carrying on business jointly. It was a restaurant and bar. They rented the first floor of the respondents' premises No 451/598 Kenyatta Avenue, Nakuru for the purpose of the business.

They appear to be monthly tenants and paid a rent of Kshs 6,000 per month. Sometime in 1986 the respondents as landlords were serous of increasing the rent three-fold. As it was a controlled tenancy within the meaning of section 2 of landlord and Tenant (Shops, Hotels and Catering Establishments) Act, the respondents could not lawfully do so without serving on the appellants the notice prescribed by the section 4 of the Act.

They claimed that on March 27, 1986, they served that notice on the appellant and his erstwhile partner Joseph Mwago. The rent was to be raised from Kshs 6,000 to 18,700 per month, and this was to take effect from June 1, 1986. The appellant was either to notify the respondents within one month of the receipt of such notice and whether they accept the increased rent or refer the matter to a Tribunal established by the Act.

The respondents said the appellant did neither and that therefore the notice had become effective and that the tenants came under a liability to pay the increased rent from June 1. Mwago admitted receipt of the notice but disclaimed any further interest in the business. The appellant however denied the receipt of that notice.

It appears that when the respondents did not receive the reaction of their tenants, they, by themselves, referred the matter to the Tribunal . They must have thought it was a faulty legal step, so they withdrew the matter from that forum. The appellant swore that the only notice he received was to attend the Tribunal. When he answered that the summons and appeared before the Tribunal, he was informed the respondents had withdrawn the "case". The respondents' next course, was to commence an action against the appellant and Joseph Mwago in the High Court. The reliefs sought of the Court and indorsed in the plaint were for:-

> (a) A declaration that the rent of the suit premises is Kshs 18,700 per month from June 1, 1986.
>
> (b) The sum of Kshs 206,400
>
> (c) Mesne profits at Kshs 18,700 per month with effect from June 1, 1987
>
> (d) Interest at the rate of 12 per cent annum and costs.

The appellant's business partner, swore that the partnership between them had been dissolved. So he contended that he had no longer any interest in the suit premises. He therefore, is not a party to this appeal.

The appellant, for his part, denied that he had been served with the notice of the increase of rent mandatorily required by section 4 of the Act. So three serious issues were joined between the respondents on one hand and the appellant on the other. They are:-

> 1. Was the notice required by section 4 given and served on the appellant in the manner laid down by the section?
>
> 2. If such notice was given, what was its legal effect?
>
> 3. If it was not proved that such notice was given, was the exaction of the increased rent lawful?

One would expect that these three serious issues would be resolved in the ordinary way by the adduction of evidence. But before the Court would settle down to consider these questions, the respondents moved for "attachment before judgment to secure a sum of Kshs 206,400 be issued herein". This application was professedly brought under Order 38 Rules 5 and 12 of the Civil Procedure Rules. It was *ex-parte* and no notice of any sort was given to the sitting tenant – the appellant. The chamber summons came before the Court, then constituted by **Masime, J** (as he then was) on May 15, 1987. In support of this application, the 1st respondent swore that he had been informed that the appellant was about

> "to abscond or leave the local limits of the jurisdiction of the court with intent to delay Plaintiffs, …… and to obstruct or delay execution of any decree that may be passed in this matter"

and secondly, that he had further been informed that the appellant

> "has disposed of and/or removed from the jurisdiction of the Court a number of his properties".

On that very day, the order sought was granted. It was promptly executed and before nightfall on that day, a Messrs Kena, Auctioneers closed down the appellant's business premises and attached some of his stock-in-trade.

The appellant's reaction to this was understandable. He applied by chamber summons to have the order for attachment set aside and that he be permitted to provide "any security required". The respondents contested this and whether the order for the attachment should be set aside or not became the subject of rival contentions made to the Judge, **Tunoi J**, by the parties' advocates. On August 25 1987, the learned Judge delivered a considered ruling in which he held that the *ex-parte* order attaching the appellant's property was wrong and he proceeded to set it aside. In so ruling, the learned Judge drew heavily on an unreported judgment of this Court in *Ndirangu v Abdullah* Civil Appeal No 10 of 1979 in which this Court held that

> "an *ex-parte* attachment before judgment without directing the defendant either to furnish security or to appear and show cause why he should not furnish security breached order 38 rule 5 and was a nullity".

The Court accordingly directed that the appellant appear before the Court on September 3, 1987 "either to furnish security or to show cause why he should not furnish security". On that day, both the appellant and his advocate appeared in Court and the latter, by argument, sought to show cause why an order to furnish security could not be properly made against the appellant. To buttress this position, the appellant lodged in Court an affidavit in which he disputed the averments to which the 1st respondent deponed. In particular, the appellant swore that he had not recently disposed or removed any of his properties and had no intention of doing so. He said the information given to the 1st respondent on which he based his supporting affidavit was false and fabricated.

To show that he was in a position to pay any judgment that may be given against him, the appellant deponed that he had substantial business interests, being the sole owner of Agricultural land at Tabogaon plot 44 on which he had erected a substantial residential house worth more than Kshs 300,000. That the Bar and Restaurant business itself was a substantial one employing 78 workmen with a daily turn over of Kshs 16,000 gross and that that business had been closed down by the attachment order. The appellant also swore that he had hitherto met the contractual rents regularly and the only extant difference between himself and the respondents, was the greatly enhanced rent. The 1st respondent, for his part, swore a supplementary affidavit and re-iterated his information that the appellant was about to abscond and indeed disposed or was about to dispose of his properties-so far unspecified. He also averred that the appellant had failed to pay the rent. He also swore that by the earlier attachment, which the Court found to have been wrongly ordered, he had been presented with a bill for Kshs 46,815 by the auctioneer and that the appellant be ordered to meet its payment.

On the material presented to the Court, it cannot be gainsaid that the appellant deponed to facts which constitutes more than plausible answer to the respondents' plea for "attachment before judgment". The burden of showing that the appellant had disposed of his properties or removed them from the Court's jurisdiction or was about to abscond in either case with the object of defeating any decree that may be passed against him, lay on the respondents. And it seems clear that on the state of the pleadings and in view of the conflicting affidavits, that burden can only properly be discharged by testing the rival averments by evidence in the conventional way. The respondents' averments only rested on information given to him by parties whom the Court did not see or listen to. Yet, the learned Judge felt able to order the attachment of the movable properties of the appellant and that the broker's charges for which the appellant was in no way responsible, should be borne by him. The appellant had said in his chamber summons in the alternative, that he was willing to provide security and sought the Court's directions as to what security he should provide. That direction was not given. The Court's answer was the order for the attachment of his movable assets. So on the date when we heard argument, those properties remained in attachment. To date, the auctioneers' charges which the Court ordered to appellant to pay, must be quite staggering, especially as it is not yet known when the actual case would proceed to a hearing.

One must look at the ratio for the Judge's somewhat oppressive order. As we read them, they are first, the appellant has not paid any rent since June 1986, second, he has not produced evidence of ownership of plot No 44 Tafuga, third, he has not "provided for evaluation to indicate the value of the house which was allegedly built on the said plot". The Judge also provided, for good measure, the questions he put to himself namely, (1) whether the defendants would be able to honour the decree if passed against them, (2) whether the plaintiffs have established the *prima facie* case. The appellant contends that the learned Judge misapprehended the purpose of the attachment before judgment and misdirected himself on the standard of proof in an application for attachment before judgment. In our opinion, the appellant was right in his contentions.

The Judge said he made the pre-judgment order to ensure that the appellant would be able to honour the decree that may be passed against him. If that were the true criterion, then any party who files a suit would be entitled to an automatic order for attachment of the defendant's property to ensure satisfaction of any decree. All he need do, is to establish, what the Judge calls, a *prima facie* case. In so directing himself, the Judge missed the real reason the respondents gave for seeking the interim relief, namely, that either the appellant, on their information was about to abscond, or had alienated his property with the sole object of defeating the execution of a judgment, that they may obtain.

There is no rule permitting attachment of property before judgment according to English practice. Our order 38 which sanctions this practice, was borrowed from the Indian Code of Civil Procedure. The learned author, Mulla, in his treatise on the Indian Code, says, *inter alia* of order 38 rule 5:-

> "The object of this rule, is to prevent the decree that may be passed from being rendered infructuous. The order that is contemplated by this rule, is not an unconditional one directing attachment of property but one calling upon the defendant to furnish security or to show cause why security should not be furnished.
>
> Where the defendant offers to give security, the Court should go into the question of its sufficiency, before issuing a final order of attachment."

In this case, the appellant showed by affidavit evidence that he was in a prosperous business and was in a position to meet any decree that may be passed against him. He even gave full particulars of landed property that he owned and its worth in money terms. He also swore that he had not the slightest intention of leaving the jurisdiction. The facts deponed to by the appellant were weightier than the bare hearsay information the 1st respondent related and on balance, the weight of the affidavit evidence titled in the appellant's favour.

At all events, the appellant offered to provide security if the Court thought this was desired. The Judge did not go into the sufficiency or otherwise of the landed property he was apparently minded to offer. His title deeds were not asked for nor were any enquiries made of his financial standing generally. The appellant was in business which was a going concern and it is unlikely that he would fold up and abscond merely because his landlord asked him for rent a subject on which he was not shown to be in default until the present dispute.

The learned Judge gave as one of his reasons for making the attachment, the fact that the appellant had not paid rent since June 1986. The reason for this is plainly not that the appellant was unable or unwilling to do so, but because its quantum was the subject of the present dispute between the parties. Indeed, as pointed out, the relief which the respondents sought of the Court was:-

> "A declaration that the rent of the suit premises is Kshs .18,700 per month with effect from June 1".

The other reliefs sought, were purely consequential depending on the success of the declaratory relief. And whether the enhanced rent was exactable, depends on disputed issues of fact which were yet to be resolved.

It is difficult to resist the observation that the order of the seizure of the appellant's property was made somewhat lightly. According to *Mulla*, when the Rules required the Judge to be satisfied:-

> "Vague allegations are insufficient. The power to attach is not to be exercised lightly and without clear proof of the mischief aimed."

(see *Mulla on Code of Civil Procedure* 18th Edn p 1502)

The respondents' hearsay assertion that the appellant was about to abscond was as vague an allegation as can be imagined. And there is no proof of any so that the appellant was minded of committing the mischief against which the rule is directed, namely the disposal of his properties.

It is also well known that an applicant for attachment before judgment must act *bona fide*. There is evidence, so far unrebutted, which suggests that the respondents' object in seeking the attachment was to punish the appellant and get him out of the premises. There is unchallenged affidavit evidence that before he took out the plaint on May 15, 1987, the respondents had filed the application for attachment. This was a day earlier. That attachment, which was found to be wrongly made, resulted in the closure of the appellant's business. There is also evidence that the respondents wrote to the Chairman of the Liquor Licensing Authority in Nakuru requesting them to withhold the appellant's license to operate a "night club bar and restaurant on the above mentioned plot". The respondents also alleged in that letter that:-

> "The roof which the tenants have been using as a disco hall was not built to cater for a dance hall, hence the risk of collapsing due to stagnant water and vibration."

The letter then ended with the following plea to the Chairman of the Liquor Licensing Authority:-

> "It is my humble submission to the Court that the licence should not be granted. I would also like to point out that the tenants have failed to pay for the rent. The matter is with the Court."

This letter was dated May 8, 1987. But in truth, the suit was not brought until May 14, 1987 and just a day afterwards, the respondents obtained an order for the attachment of the appellant's property and succeeded in having the business closed down. In our opinion, a clearer case of malice on the part of the respondents can hardly be imagined.

Before us, this indefensible attachment was sought to be defended by argument that the notice for the increase of rent was served on the appellant and that the payment of the enhanced rent was properly demanded and as no payment was made of the increased or contractual rent, the order of attachment was properly made. For authority, Counsel referred us to the English decision in *Mareva Compania Naviera v International Bulk Carriers* [1975] 2 Lloyds Rep 509Z where it was held that:-

> "If it appeared that a debt was due and owing and there was a danger that the debtor might dispose his assets so as to defeat it before judgment, the Court had jurisdiction in a proper case to grant an interlocutory injunction."

This is what has come to be known as the Mareva injunction.

As we pointed out, there is no provision under English rules of practice to order attachment before judgment. The observations made in *Lister v Stubbs* [1980], 45 Chd 4, suggest that the policy reason for this, is that "the Court has no jurisdiction to protect a creditor before he gets judgment." The granting of the Mareva injunction is of recent vintage and is a modern judicial innovation designed to meet a felt need where defendants beyond the jurisdiction who are sued in England, and have assets there, can quickly put these assets out of the reach of judgment creditors in England.

But that remedy is *in personam* and is directed at the defendant to restrain him from removing his assets out of the English Court before judgment. It is not a right in "*rem* authorizing the seizure of the defendant's assets before his liability was established in a judgment". Had the respondents in the instant

case entertained a genuine and well grounded fear that the appellant was minded of removing or disposing his assets to defeat a possible execution, our procedural rules are not without a remedy they can usefully invoke. They could have availed themselves of Order 39 and sought an interim injunction to restrain him from alienating, removing or otherwise disposing of his assets before the delivery of judgment.

In the comparatively recent case of *Ndungu v Mbugua and another* Civil Appeal No 112 of 1984, where we delivered judgment on February 12, 1987, the High Court as here, ordered attachment before judgment. This resulted in unreasonably large auctioneer's storage charges and other kindred expenses. The Court accepted Counsel's criticism of the order attachment and *inter alia* said:-

> "We agree with the appellant that the learned Judge did not explore the facts and law sufficiently widely which caused him to misdirect himself on the principles involved and that he failed to see that the Plaintiff/Respondent acted unreasonably."

Every word of that passage applies to this case save that in attaching the appellant's stock-in-trade and closing down his business before judgment, the respondents acted not only unreasonably, but also maliciously. We think the order of attachment made by **Tunoi J** must go as indeed the one made by **Masime J** went.

As we said, the learned judge **Tunoi J**, also ordered the appellant to pay the broker's charges. That order was obviously predicated on the fact that the order of attachment was properly made. In our opinion, that order of attachment was maliciously sought by the respondents and was wrongly made. Elementary justice requires that the respondents who procured the making of this order which greatly damnified the appellant, must foot the bill represented by the Auctioneers for the first attachment which **Tunoi J** set aside as having been made in error. For an attachment that covered a period of 13 days, that is August 15 to 28 1987, the Auctioneer's presented a bill of Kshs 46,815.

The present attachment was ordered on September 16, 1987, and is still continuing. If it is revoked on the delivery of this judgment say, on October 16, 1988, after a 13 month period, and assuming the bills are computed on the same basis, the bills should work at something, like one million, one ninety six thousand and twenty one shillings (Kshs 1,196,021) it hardly makes sense for a defendant to be saddled with the payment of over one million shillings security for the payment of the sum of Kshs 206,400.

In the *Ndungu* case referred to above, the claim was for Kshs 44,000.00 and this was secured by attachment before judgment, and then due to a prolonged delay, the Court Broker's fees amount to no less than Kshs 812,945.00. This Court thought there must be something seriously wrong and observed:-

> " There is another principle with regard to costs which also applies to charges and that it is that the person taking legal action must see that using court process is not taken to the extent of punishment, in the sense that unnecessary charges are heaped upon the other side. If they are, the Court has a discretion to grant relief to prevent an abuse of its process".

In *Meru Farmers Co-operative Union v Suleiman* (No 2) [1966] EA 442, Sir Charles Newbold P gave expression to his view on this matter in like vein. He said:-

> "The courts should always be extremely anxious to ensure that the due administration of justice does not cause unnecessary expenses. If any course of action which either litigant chooses to adopt would result in unnecessary expense, the courts should be zealous to ensure that such a course of action is not open. A court should, not itself be used as a tool to incur unnecessary expenses where it is satisfied that such expense is unnecessary".

There is elementary wisdom in these observations. Had the respondent prayed in aid the equitable remedy of interim injunction to restrain the appellant from either absconding or disposing of his assets, assuming these were believed to be the case, the cost to either party would have been within limits permissible by reason and common sense.

If the result, in this case teaches anything, it is that Courts should be extremely slow in ordering attachment of a defendant's property before judgment not only because it is hardly consistent with justice to exact "punishment" but also because in view of the tendy and time-consuming process of the Courts, the rights and liabilities of the parties may not be determined for a long time, possibly years.

Our conclusion is, that the attachments before judgment made by **Tunoi J** on September 16, 1987 of the appellant's assets was ill-inspired and was made in error and should be set aside. And that the respondents must pay the Broker's charges and fees. We would make the same order in respect of the Broker's charges and fees incurred pursuant to the pre-judgment attachment made on August 15, 1987, by **Masime J** (as he then was).

We would order the respondent to pay the appellant the taxed costs of the these proceedings here and below. We would leave intact the appellant's right to compensation from the respondents for any damages he may have suffered for these manifestly wrongful attachments.

Dated and delivered at Nakuru this 21st day of October 1988

J.O NYARANGI

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JUDGE OF APPEAL

F.K APALOO

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JUDGE OF APPEAL

J.M GACHUHI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR