REPUBLIC OF KENYA

Simiyu v Sinino

Court of Appeal, at Kisumu April 24, 1985

Hancox JA, Chesoni & Nyarangi, Ag JJA

Civil Appeal No 108 of 1984

(Appeal from the judgment and order of the High Court at Kakamega, Gicheru, J)

April 24, 1985, Hancox JA delivered the following Judgment.

This appeal arises out of an attachment carried out by the Court Broker at Kakamega, one Moses Wabuko, whereby several items of furniture and sixteen head of cattle were seized items of furniture and sixteen head of cattle were seized pursuant to warrants of attachment and sale issued by the District Magistrate at Bungoma, dated apparently August 15, 1975. The property was said by the Appellant in his evidence to have been attached on September 10, 1975, and detained until January 6, 1976. The movable items of furniture and form equipment belonged to the Appellant, and the sixteen head of cattle which were grazing in the filed belonged to the neighbours. As a result of objection proceedings taken not only by the Appellant but by four other persons, one of whom gave evidence in the case, the attachment was ordered to be lifted and a consent order was made ordering Dorcas Nasambu to pay Kshs 200.00 forthwith and thereafter Kshs 200.00 by monthly instalments, presumably to the then defendants, the second of whom is now the Respondent tot his appeal.

Unfortunately the Appellant was not a party to the case in which the attachment was ordered, if there was a valid order. The plaintiff in that case was his daughter Dorcas Nasambu who had sued the first and second defendants, who were father and son, because she was made pregnant by the son, and the cause of action appears to have been fro breach of promise of marriage. The relevance of this is because whereas the Respondent, then the second defendant, said that Dorcas was aged fourteen at the material time, the Appellant, her father, who might be taken to have known her true age, said she was born in 1954, making her nineteen in April, 1973,w hen the cause of action arose. If that was so then the action might well have been correctly brought by Dorcas, rather than by her father under the customary law for damages for her pregnancy. Dorcas obtained a default judgment against the Respondent and his c0-defendant for Kshs 1,500.00 on March 12, 1974, but this was set aside on the application of Mr Menezes, who was then instructed for them, under Order 9A Rule 10 of the Civil Procedure Rules on March 19, 1975. I would have thought that the Kshs 1,500.00, together with the costs that had been paid to Dorcas, if not refunded automatically, would have been the subject of a Court order to that effect, but no order seems to have been made. Instead, without hearing the Appellant, the magistrate ordered an attachment warrant to issue against the property of the plaintiff (meaning Dorcas)

> “in order that the defendant may recover the money he paid to the plaintiff as a result of the ex parte judgment which has already been set aside.”

As I have said the property of the plaintiff, and not Dorcas, was attached. There was evidence that this was at the instigation of the Respondent, and the magistrate expressly found that he hand his co-defendant

had set it in motion. Certainly it was they who applied for execution by the attachment of cattle. Moreover, the warrant of attachment states that Dorcas had been ordered by deceree to pay Kshs 3,423.40, being the Kshs 1,500.00 plus the Court's fees and charges, on March 19, 1975, though an inspection of the record shows that there was no such order, as I have already said.

The result of the foregoing was that the plaintiff sued, not the court broker, for the presumably thought that he was statutorily protected, but the Respondent and his father, who were the parties to the original suit brought by Dorcas. He claimed damages for trespass and wrongful attachment. No statement of defend has been included in the main record of appeal, but that on the original file entered on behalf of the Respondent, was in effect a general denial together with a prayer that the Plaint be struck out on the grounds that it was frivolous and vexatious and disclosed no reasonable cause of action. The magistrate, after hearing the case, awarded the Appellant Kshs 918.50 by way of special damages and Kshs 10,000.00 by way of general damages.

This decision was reversed by Gicheru J, who, after stating the facts, continued:-

> "To begin with, although the appellant and his co-defendant in the lower court may have applied for the execution of the decree in the Bungoma District Magistrate's Court Civil Case No 35 of 1973 the process of execution was carried out by the Court through an official Court Broker. Indeed, their having made the application for execution of decree and their subsequent directing the Court Broker to the home of the respondent did not mean that they carried out the attachment of the respondent's movable property. That job was carried out by the Court Broker who did so under the authority of the Bungoma District Magistrate's Court. In attaching the appellant's movable property the Court Broker did so as an agent of the court aforesaid and not as an agent of the appellant and his codefendant in the lower court. The appellant and his co-defendant could not therefore be liable for acts of the Court Broker in attaching the respondent's movable property. The respondent's redress lay elsewhere. For this reason I will allow the appellant's appeal with costs."

So far as it goes I agree with this statement of Gicheru J Munishi, appearing for the Appellant, cited the case of Davis & Shirtliff Ltd v The Attorney General / 1978/KLR, 272, which was a case where the Court Broker had levied attachment and embezzled the proceeds thereof. It is authority for stating that under Section 4(5) of the Government Proceedings Act, Cap 40 the Government may not be sued for the acts of any person discharging any responsibilities which he has in connexion with the execution of judicial process. It cannot, I think, be disputed that the issue of the warrant of attachment would be classed as "judicial process", within the meaning of the sub-section. However, the Davis & Shartliff case seems to have decided that the Court Borker is an agent of the Court, but it did not decide that he was not an agent of the execution creditor. Gicheru J held in this case that in attaching the Appellant's property the Court Broker did not act as agent of the Respondent or of his co-defendant.

Secondly, the court broker is himself not liable to be sued for the execution of that warrant by reason of the latter part of section 6 of the Judicature Act, CAP 8, which states:-

> "…..no officer of a court or other person bound to execute the lawful warrants, orders or other process of a judge or such person shall be liable to be sued in any court for the execution of a warrant, order or process which he would have been bound to execute if within the jurisdiction of the person issuing it."

In the result the Court Broker in this case could not be sued for his acts in executing the warrant of attachment, provided it was in respect of the property of the person against whom, according to the warrant, it was directed to be executed. It cannot be denied that, whether or not there was a Court order to this effect, Dorcas was the person named in the warrant and it was her movable property that was ordered to be attached. The Court Broker, who did not give evidence, was not specifically stated by the eye witness, Wilson Masai, to have gone with the Respondent to the plaintiff's house on September 10, 1975. Nevertheless it is not, I think, disputed that he did go there on that day. Wilson said there were eight people, including one askari and that one of the party enquired where Dorcas was. Although the

Appellant (supported by Wilson Masai in this respect) said she did not stay with him the premises to which the Court Broker went were undoubtedly either described or pointed out to him by the Respondent, and I observe that in the Application for execution of the decree, which was signed by the Respondent and his co-defendant, it is the Appellant's name which is inserted in the box "Against whom to be executed" and not that of Dorcas. It would seem strange that the Court Broker did not notice the inconsistency between that and the person named in the warrant of attachment.

What therefore was the cause of action? It can only have been in tort and, if maintainable, would have been based on the acts of the Respondent and his co-defendant in, as the magistrate found as a fact, setting the attachment in motion. What were those acts? First, each of them signed the Application for execution of the decree, and as they were parties to the action and there was a court order supporting the warrant of attachment (though not the repayment of the original Kshs 1,500.00 and costs) recorded in the case they were, I think, entitled to make that application, though not to insert in it that the property to be attached was that of the Appellant. This is so even if the original suit was for damages for pregnancy, because it was not instituted by the Appellant as her next friend (as it should have been), as the magistrate / noted in his judgment. I observe in passing that if Dorcas was nineteen at the relevant time, then she could bring an appropriate action in her own name, the age of majority now being eighteen under the Age of Majority Act, CAP 33. The next act was that the eye witness Wilson Masai said the Respondent accompanied an askari and others to the Appellant's house on September 10, 1975, when the goods were seized. That was denied by the Respondent, who also denied he was a party to that suit. No express finding was made by the magistrate as to whether the Respondent accompanied the Court Broker or not, but it seems that, impliedly, he found that the Respondent's acts were limited to directing the Court Broker to the Appellant's premises, because of his finding that he had set the attachment in motion. There was no suggestion that the order defendant who has not been a party to either appeal, went with the Court Broker on that day.

Can it therefore be said that the Respondent (for he is the only party we are concerned with on this appeal) by directing the Court Broker to the Appellant's house, but not accompanying him, given that he was a party to the case, committed a tort against the Appellant?

It seems that at common law, it is an actionable trespass maliciously to set the law in motion so that the wrong person's goods are seized, or the wrong person is arrested. It is distinguishable from the tort of malicious prosecution, which necessarily involves there having been a criminal prosecution. But in the fifteenth edition of Salmond on Torts, at page 551, under the heading "Proceedings instituted maliciously", after malicious prosecution is discussed, there appears this passage.

> "On the same principles it is an actionable wrong maliciously and without reasonable and probable cause to issue execution against the property of a judgment debtor."

The authority cited for this Clissold v CRATCHLEY, [1910] 2KB, 244. The same case is cited in Clerk & Lindsell On Torts, Fifteenth Edition at paragraph 18-42, where the authors take the view that damages will lie for the malicious setting in motion of Court process, where for instance part of the debt has been paid and it is nevertheless knowingly issued for the full amount, and they continue:-

> "If a judgment dent has been satisfied without the creditors' knowledge and he proceeds to levy execution, he may still be liable in trespass, though in the absence of malice he cannot be liable for malicious abuse of process.

In Halsbury's Laws of England, 4th Edition Volume 17, page 457, after stating the position where malice exists, the text states

> "An execution is also wrongful where the indorsement on the writ directs the sheriff to levy at a wrong address or on the goods of a person other than the execution debtor – Morris v Salbert [1889] 22 OBD 244."

Finally, at paragraph 432 of the same volume of Halsbury it is stated

> "The writ of execution must be indorsed by the person issuing it with the address against whom it is issued. …… if the indorsement is erroneous and the sheriff is ……. Misled into seizing goods which are not liable to seizure, the solicitor who made the indorsement and his client are liable with trespass, but neither …… is liable if the indorsement is correct, so that the sheriff, although he seized the wrong goods, was not misled by it. If the sheriff is misled by the indorsement, however n and damages for a consequent trespass are recovered against him, he can maintain an action for an indemnity against the judgment creditor."

It seems from the foregoing therefore that the wrongful setting in motion of the law by a judgment creditor, and the Respondent has stood to a limited extent in the shoes of a judgment creditor, is actionable as a trespass even if malice is not shown. As is stated in Clerk and Lindsell at paragraph 18-07, to prosecute is to set the law in motion and the law is only set in motion by an appeal to some person clothed with judicial authority in regard to the matter in question and to be liable for malicious prosecution a person muth be actively instrumental in so setting the law in motion". I think the same principle applies to the malicious issue of process.

In the instant case there was no finding with regard to malice. But / this ingedient, on the authority of Clissold vs Cratchley (supra) is not essential to sustain an action for trespass, as opposed to an action on the case. The latter action was considered to be only available when an act is forbidden by law in Dunlop vs Woollahra Municipal Council [1981] 1AER page 1203 at page 1208, when Lord Diplock referred to it as an "innominate" tort. In Clissold vs Cratchely a solicitor issued out in London a writ in respect of costs awarded to the Defendant, his client, and execution was levied on the Plaintiff's goods. Unknown to the Solicitor the costs had been paid at the solicitor's branch office a few hours before the writ was issued. In an action for improperly levying execution and, alternatively, for trespass, there was an express finding that neither the client nor the solicitor had acted maliciously. The Divisional Court, on appeal from the County Court, held that they could not be liable in trespass in the absence of malice. This was reversed by the Court of Appeal, Vaughan Williams L J saying at page 249:-

> "Arriving, as I do, at the conclusion that this was an action of trespass, and that it was totally unnecessary for the plaintiff to give evidence of malice, it is necessary to see whether anything can be relied on as showing that a judgment in trespass was wrong. I can see nothing at all to warrant such a conclusion."

At page 250, Farwell L J said:-

> "No writ of execution can lawfully issue on a judgment that has been paid or satisfied before issue of the writ; there is no judgment left on which to base the writ, and the writ is void ab initio , and trespass will lie against the satisfied creditor and his solicitor who have put the sheriff in motion."

And concluded :-

> "I think also that the judgment of Phillimore J in the Divisional Court shews that he too was under a misapprehension as to the effect of Gibson v Chaters; he says "If it were trespass, no proof of malice would be necessary"; but the present case is trespass, and therefore the plaintiff is entitled to our judgment."

Does it follow that an action for trespass will lie if the wrong person's goods are attached, if this is due to the Sheriff or Court Broker being misled by the act or statement of the person at whose instance the process of execution is set in motion.

The case of Morris v Salbert [1889] 22 QBD 614 is very similar to the present case. The defendant had recovered judgment in an action on bills of exchange against G M Morris. A writ to the sheriff to execute on his goods was taken out by the defendant's solicitor, who indorsed the writ with the address of his father, G Morris resided elsewhere. The sheriff entered the premises of G Morris and seized the

goods. He sued for damages for trespass and wrongful seizure of goods. The jury expressly found that the sheriff was misled by the direction from the solicitor. The judge, it seems, then found for the defendant on the basis that the indorsement on the warrant did not amount to a direction to the sheriff to seize the goods of the plaintiff. In reversing this decision Lord Esher Mr said:

> "The question in any case whether it does amount to a direction to seize the particular goods seized appears to be a question of fact for the jury or other tribunal which has to decide the facts. Therefore we have in this case something indorsed on the writ by the defendant's solicitor, by whose action in making such indorsement the defendant is bound; and, even if it was not meant to be a direction to seize the goods seized, yet I think if it was in such a form as it misled the sheriff into thnking that it was, the result would be the same; for, if a person makes a statement that may well misle, and does in fact mislead, the sheriff into thinking that he was directed to seize the goods seized, it seems to me that such a statement renders the maker of it liable as if he had intended to give such a direction."

Fry & Lopes L JJ were of the same opinion.

Under Order 21 Rule 6 of the Civil Procedure Rules an execution application is to be made in the form specified in Form No 5 of Appendix D., which contains in tabulated form all the particulars required for the execution which are set out in order 21 Rule 7(2). Included in them is a panel

> "Against whom to be executed"

In the instant case, as I have said, the name "Blassio Simiyu" is entered against that question. The form is signed by the Respondent and his co-defendant. They knew, or should have known, full well that the order of attachment had been made against Dorcas in the first case, she being the only party named as plaintiff in the original suit. There was never any question, even supposing Dorcas was a minor at that time. That the Appellant was brought into the suit as here next friend.

By inserting in the application for execution the name of the wrong person, even though he happened to be the father of Dorcas, the Respondent and his co-defendant misled the Court Broker into attaching the wrong property. The magistrate made a finding that each of them had caused the Court Broker to proceed to the plaintiff's premises and attach property there. There was evidence to support this finding, for the Respondent said he had directed the Court Broker to the Appellant's house and that he knew the cattle as his. The other defendant said:

> "The Court asked me to pay Kshs 150.00 to attach properties of plaintiff. The father of Dorcas Simiyu."

In my judgment those acts and statements amounted to clear directions to the Court Broker to attach the Appellant's property within the authority of Morris v Salbert (supra). Each of them was responsible for misleading the Court Broker into doing this. I would therefore hold that the Respondent, as the only party before us on this appeal, is liable to the Appellant in damages for trespass for the wrongful attachment of his goods. As the claim was against them both, jointly with severally and the magistrate gave judgment upholding the claim, the Respondent should be liable for the full amount on a joint and several basis.

I would therefore allow the appeal to this extent, set aside the order of the judge allowing the Respondent's first appeal, and restore the order of the magistrate awarding Kshs 10,000.00 general damages and Kshs 918.50 special damages as regards the Respondent. I would award the costs of the appeal and the proceedings in the High Court to the Appellant.

As Nyarangi, J A, and Chesoni Ag J A agree those are the orders of the Court. Chesoni Ag JA. Dorcas who is the appellant's daughter sued James Kuloba s/o Wanjal and Vincent Wanjala Sinino in the District Magistrate's Court Bungoma Civil Case No 35 of 1973 for breach of a contract of marriage. James Kuloba is the one that broke the promise to marry Dorcas and it is not clear why his father Vincent was

joined. Dorcas claimed compensation of Kshs 1,500.00. Neither defendant appeared in Court on the date fixed for hearing of the suit and on March 12, 1974 District Magistrate 1 Mr Maritim heard the case exparte and gave judgment for Dorcas. That judgment was, however, set aside by District Magistrate 1 Mr Otieno on March 19, 1975, but there was no order that the compensation if paid, and it appears it had been paid, should be refunded by Dorcas to the defendants. Be that as it may, Mr Otieno ordered on August 13, 1975 that an attachment warrant should issue for attachment of Dorcas's property by the defendants in order that the latter may recover the money they paid to Dorcas.

The record is sketchy but it seems, and, it was submitted in subsequent proceedings, that property belonging to the appellant, who is Dorcas's father and with whom she lived, was attached and he successfully objected against the attachment.

It is apparent that no warrant of attachment issued and it is not in dispute that the Court Broker was led to the appellant's home by the respondents. The appellant sued the respondents in the Kakamega H C C C No 9 of 1976 for trespass and for an unlawful attachment of his household property. He claimed special damages of Kshs 918.50, and also prayed for general damages. I was unable to follow what happened to that case, but there is Resident Magistrate' s Court at Kakamega C C No 227 of 1979 which Mr Githinji heard and gave judgment for the plaintiff (appellant) for Kshs 918.50 special damages and Kshs 10,000.00 general damages with interest and costs.

The respondents successfully appealed to the High Court against Mr Githenji's judgment which was set aside by Gicheru J and Simiyu appealed to this Court.

The Court Broker was not joined in the suit against the respondents. The appellant could and was entitled to sue the respondents for trespass and wrongful attachment to which they were a party. The attachment was not supported by a lawful or any warrant of the Court and so the Court Broker had no authority to levy the attachment. He and those who led him to Simiyu's house to attach the property were trespass and acted unlawfully. The Court Broker was, in the absence of a warrant of attachment, not an agent, officer or representative of the Court and he was therefore not protected by the decision in Davis Shirtliff Ltd v The Attorney General [1978] K L R 272 because in view of s 6 of the Judicature Act (Cap 8), there being no order for Dorcas to refund any money and no warrant of attachment the Court Broker was not executing a lawful warrant or order or other process of the court and he and those (the respondent) collaborating with him were liable to be sued for their acts if they resulted into a tort.

The appellant sued only the respondent and his co-defendant. That was proper because the respondent and his co-defendant were a party intervening in an execution and even where the process is issued such a party may make himself liable for what is done under the process, if he takes on himself liable for what is done under the process, if he takes on himself to issue orders or directions (as the respondent and his co-defendant did) to the officer entrusted with the execution, and in consequence of those orders and / or directions a wrongful act is committed. This is so because the party will have made the officer his agent to do that wrong: Sowell v Champion (1837) 6 A & E 407 cited Clerk & Lindselll on Tort 14th Edn p 369 para 694. The position is also clearly illustrated by the case of Morris v Salberg (1889) 22 QBD 614 that the liability attaches by relation to the principal of an agent who has directed the officer to do the wrongful act. The respondent and his co-defendant directed the Court Broker to do the wrongful act of trespass and wrongful attachment as opposed to merely giving to the Court Broker information or advice, and in my view they were severally jointly liable. The Court Broker seized the appellant's goods because was misled by the respondent and his co-defendant. That was a question of fact which the trial magistrate was entitled to make a finding on and he so found.

There was trespass to the appellant's property or chattels and as stated at p 670 para 1073 in Clerk & Lindsell On Tort ibid. "the action of trespass has always been a remedy affording compensation for injury to a chattel in the plaintiff's possession. The sole question is whether the defendant has directly interfered with the plaintiff's possession. Trespass remedies any damage thus caused; it is also (usually) actionable per se , that is, without proof of actual damage to the chattel" (word in brackets mine).

For the reasons stated I agree that this appeal should be allowed on the terms on the terms suggested

in the judgment of Hancox, J A which I had the advantage of reading in draft and I agree with the orders proposed therein.

Nyarangi Ag JA

Before writing this judgment I have had the advantage of seeing in draft the judgment of Hancox J A with which I agree. I would add only this. Even if the original suit was for damages for pregnancy, only the father or guardian of Dorcas would sue the man who had made her pregnant because the man is liable to pay a fixed amount by way of compensation to the father or guardian of Dorcas. See Restatement of African Law Volume 1 E Cotran, p 55. Dorcas would not sue because mere sexual intercourse with a girl is not actionable under Luhya customs unless Dorcas lost her virginity, if any, in which case, yet again, the father or guardian but not Dorcas could sue to claim compensation. It would also appear that under Luhya custom, Dorcas would not sue for breach of promise of marriage.

I concur with the order on costs.