REPUBLIC OF KENYA

COURT OF APPEAL AT NAIROBI

(Simpson C.J., Potter and Kneller JJ.A.)

CIVIL APPEAL 70 OF 1982

Appeal from the High Court at Nairobi, (Chesoni, J.)

INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION.....APPLICANT

V

J. KEMUMA ONYANGO & 3 OTHERS.....RESPONDENT

Cases

Olivia Siqueira E Facho and another v ER Sequeira and Others

[1933] 15 KLR 34

Ujagar Sing v Runda Coffee Estates Ltd [1966] EA 263

KM Muli for Appellant

SM Munikah for Respondents

17th June 1983.

KNELLER, J.A. :

The Industrial and Commercial Development Corporation, the appellant, asks this court to reverse a ruling of the High Court (Chesoni J as he then was) of August 19, 1982 and make J. Kemuma, Onyando, S Obegi Kababe, J Nyaota Oriki and J Oriki, who trade in Kisii as the “Friends Bakery”, the respondents, pay the costs of the appeal and the proceedings in the High Court.

The ruling was given in answer to an ex parte summons in chambers of August 19, 1982 of the respondents expressed to be brought under rule 3(2) of the High Court (Practice and Procedure) Rules, Section 3A and Order XXI rule 25 of the Civil Procedure Rules. The respondents asked the High Court judge to hear the application in vacation which was granted under the provision of rule 3(1) of the High Court (Practice and Procedure) Rules. I think with respect, rule 3(2) is the correct sub-rule for this).

The respondents also asked (at the last moment) for a stay of execution of the decree passed in the suit because the application for execution was not served on the m and there was no order for service to be dispensed with. A stay was granted.

They asked for leave to apply to the High Court for an order allowing them to liquidate the decretal amount by instalments. They had been negotiating for this indulgence after the attachment but the appellants refused to countenance it. This prayer was not answered.

The costs of the application, the respondents suggested, should be the subject of an order making them costs in the course (sic) but the learned judge rejected this and, instead, ruled that there would be no order as to the costs of the application.

The appellant's plaint of May 13, 1980 claimed jointly and severally from the respondents Kshs 131,868.30 with interest at 10% a year from February 1, 1980 until payment in full together with costs and interest at court rates.

They were all served with summons to enter appearance to this but none did not judgement in default was entered against them on September 22, 1981 for Kshs 164,835.35 with 10% interest a year on it until payment in full with costs as prayed and a decree reflection all that issued on April 15, 1982.

The appellant applied on June 15 for execution of the decree by attachment and sale of the respondents' machinery, motor vehicles, stock-in-trade and other attachable property registered in the above company (sic) to satisfy the decretal amount, further costs and interest. A proclamation of July 28, 1982 of the Nyaluoyo auctioneers, court brokers in Kisumu advertised the sale by public auction on August 20, 1982 at 10 a.m. of the respondents' attached goods if the respondents did not pay the broker Kshs 188,098.85 and his charges and costs in the meantime which they did not do.

The goods included a Volkswagen, Datsun pick-up, record player, radio cassette, chairs and tables (but no bakery equipment).

There are two more facts to underline. First, the respondents admitted liability and, secondly, they did not challenge the decree which meant that the judge could not order that payment of the amount decreed be postponed or made by instalments without the consent of the appellant which was very far from consenting to any such thing. Order XX rule 11(2).

The appellant does not submit that the learned judge was not the vacation judge duly appointed by the Chief Justice at the time under rule 6 of the High Court (Practice and Procedure) Rules or that the respondents could not file their application of August 19, 1982 as an urgent one or that the judge could not deal with it is satisfied that it was urgent under rule 3(2) (ibid).

It does complain, however, that the application for a stay should not have been granted ex parte and, in my view, this is justified for even if the application were made on August 19 in Nairobi and the auction was to be held on August 20 in Kisumu at 10 am, under Order XXI rule 63.

> "(1) The court may, in its discretion, adjourn any sale hereunder to a specified day and hour, and the officer conduction any such sale may in his discretion adjourn the sale, recording his reasons for such adjournment; Provided that where the sale is made in, or within the precincts of, the court no such adjournment shall be made without leave of the court.
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> (2) Where a sale is adjourned under sub-rule (1) for a longer period than seven days, fresh public notice shall be given, unless the judgement debtor consents to waive it." So the sale by auction could have been postponed by the learned judge and the auctioneer told to do so, to a date far enough ahead to give the respondents time to serve the appellant in Nairobi with the papers and for an early hearing date to be fixed for the hearing of the summons.

As long ago as November 10, 1933 Flucie-Smith Ag CJ held that the former Supreme Court had inherent power ex debitio justitiae to order stay of execution pending an appeal in Olivia Da Ritta Siqueira E Facho & Another v ER Sequeira, BA Roderigues and RA Ribeiro (1933), 15 KLR 34 (k) and Newbold P Sir Clement de Lestang Ag VP and Spry JA of the Court of Appeal for Eastern Africa in Ujagar Singh v Runda Coffee Estates Ltd [1966] EA 263 (CA-K). There was no appeal pending here but it may be that

there could be other circumstances calling for the court to exercise that jurisdiction. So the summons of August 19 was rightly brought under Section 3A of the Civil Procedure Act (but not Rules as the respondents' advocates carelessly put it). There were no grounds for invoking it in this case.

Order XXI rule 25 relates to the court's power to stay execution of a decree in a suit if the decree holder is a defendant in another pending suit in which the judgement debtor in the concluded one is the plaintiff, which is not so in this one, so Order XXI rule 25 was wrongly cited at the head of the summons.

The judgement debtor is to be served by the court and so is the decree-holder with a notice of place and time which the deputy registrar or magistrate will hear them on the terms and conditions of the sale of immovable property that has been attached Order XXI rules 60 and 61 unless for reasons to be recorded by him the notice to the judgement-holder may be dispensed with or substituted service thereof by ordered. Order XXI rule 61(2). This does not apply to moveable property.

There is, however, no provision in the Rules requiring the court to issue a notice to the person against whom execution is applied for requiring him to show cause on a date to be fixed why the decree should not be executed against him if it is to be by attachment of moveable property in or not in his possession unless the application is made more than one year after the date of the decree or against the legal representative of a party to the decree. Order XX rule 18. The only reason for having a notice of an application for execution of a decree issued for service on the judgement debtor is to give him and opportunity to show cause why execution in that way should not take place.

Where the decree is for the payment of money, execution by detention in prison of the judgement debtor, however, may not be ordered unless he has been given this opportunity and then only if the court is satisfied, for reasons to be recorded in writing, one or more of six conditions is or are fulfilled. Section 38 Civil Procedure Act and Order XXI rule 32, 35 Civil Procedure Rules. If, however, at the passing of the decree the judgement debtor is within the precincts of the court, the holder of a decree for payment of money may apply orally for immediate execution of it by arrest of the judgement-debtor and the court may grant it. Order XXI rule 7.

The learned judge was of the view that at every stage of a suit each party must have notice of what step the other is going to take next in it, whether or not he has entered appearance, filed a defence or disputes the other's right to do this.

He illustrated this with two examples. First, the judgement debtor who did not contest the suit at any stage and finds his vehicle worth Kshs 300,000 attached and sold in satisfaction of a decree for Kshs 2,000. Secondly, the judgement debtor who is away out of Kenya when service of the summons to enter appearance is served on his agent and judgment entered against him abut application for execution by attachment and sale is made without notice when he is back in Kenya.

The answer is, I believe, to be found in the fact that if he is aware of the attachment in time and tenders the decretal sum and broker's charges and costs before the sale the attachment will be raised and his movable property restored to him. An if he is not aware of it in time, a sale of movable property, although not vitiated by any irregularity in publishing or conduction it, does not preclude anyone who sustains an injury, by reason of that irregularity at the hand of any other person, instituting a suit against him for compensation, or (if such person is the purchaser) for recovery of the property and for compensation in default of its recovery. Order XXI rule 69.

Where the liberty of the citizen is not threatened and the property is movable the Act and Rules do not require the judgement debtor to be given notice to show cause why his moveable property is to be attached and sold in execution of a decree and the reason is because the decree-holder has his judgement and decree and he must satisfy it before the judgement debtor disposes of his movable property.

Accordingly, I am of view that this appeal should be allowed with cost for the reasons I have set out.

SIMPSON, C.J.:

I agree that this appeal should be allowed with costs for the reasons given by Kneller JA in his judgement.

As Potter JA also agrees it is so ordered.

POTTER, J.A.:

I have had the advantage of reading the judgement herein of Kneller JA. I agree that this appeal should be allowed with costs for the reasons given in that judgment. The rules in Order XXI would appear to be carefully designed to do justice as between the decree holder and the judgement debtor. There may be occasions when a judge might properly supplement those rules by invoking his inherent powers in order to do justice between the parties, but this was not such an occasion.

18th May 1983