REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CIVIL APPEAL 37 OF 1978

D.T. DOBIE & COMPANY (KENYA) LIMITED ....…....…..APPELLANT

VERSUS

1. JOSEPH MBARIA MUCHINA

2.LEAH WANJIKU MBUGUA …….....…….RESPONDENTS

(Appeal from an order of the HighCourt of Kenya at Nairobi (Todd,J.) dated 12th June, 1978

In

Civil Case No. 1666 of 1977)

****

JUDGMENT

The first respondent (plaintiff in the High Court)was the registered owner of a Mercedes saloon motor car(Mercedes) registration number KPK 987 which the plaintiff had taken to the appellant's (second defendant) premises for repairs from where it was collected by C.I.D. officers in connection with some investigations. On 9th November, 1976 the second respondent (first defendant) obtained an order for the conditional attachment of the Mercedes in the High Court Civil Case No. 2468 of 1976 which she as the plaintiff in that suit had instituted against one Kasila Mulindwa as the defendant for the recovery of a sum of money, on the strength of her own Affidavit and an affidavit sworn by an employee of thesecond defendant named Mbango, the first defendantdeposing in her affidavit that as informed by Mbango,which information she believed to be true, theMercedes belonged to Kasila Mulindwa and it was lyingwith the second defendant awaiting delivery or sale onbehalf of Kasila Mulindwa. The Mercedes was attachedunder the order of the Court which stated:-

> "1. That the conditional attachment of Motor Vehicle Mercedes Benz 350 SLCregistration No. KPK 987 belongingto the Defendant (Kasila Mulindwa;and lying in the hands of D.T. Dobieand Co. (K) Limited (second defendant)or lying in the hands of the Defendant(Kasila Mulindwa) or his agent orservant within the jurisdiction of thisHonorable Court be and is hereby issued.
>
> 2.....'

On 9th November, 1976 the Mercedes was collected by Mbango from C.I.D. Headquarters. The plaintiff

after unsuccessfully demanding return or release of the Mercedes to him by the second defendant instituted his proceedings against the first and second defendants. In this appeal we are not concerned with the case against the first defendant. The plaint set out the order of the court for the conditional attachment of the Mercedes and paragraphs 10 and 12 thereof read as follows:-

> "10. On or about the said 9th November,1976, the Second Defendant'semployee Ezekiel Mbango withoutany authority whatsoever collectedthe Plaintiff's said vehicle KPK987 from the Nairobi Area C.I.D. Headquarters at Nairobi together withits registration book and wrongly andwithout any authority took possessionof the said vehicle.
>
> 12. The Second defendant although requested torelease the said vehicle of the Plaintiffwrongfully possessed by it refused and orfailed to release the same to the Plaintiffand wrongfully detained it."

The plaintiff's prayers against the second defendant were set out in paragraph 16 of the plaint of which sub-paragraph (B) supplicated:-

> ." (B) -And the Plaintiff further prays forjudgment against the 1st Defendantthe 2nd Defendant jointly and severallyfor:-
>
> (a) damages together with interest thereonfor wrongful attachment and detentionof the Plaintiff's property;
>
> (b) Costs of the action;
>
> (c) Such further or other relief as to this Honorable Court may seem just."

The second defendant entered appearance and followed it up with a Chamber Summons under Order 6 rule

13 of the Civil Procedure Rules for an order that:-

1. The plaint against the second defendant be-struck out as:

> "(a) disclosing no cause of action againstthe second defendant;
>
> (b) an abuse of the process of the Court."

Order 6 rule 13 is a rule of clarity. It reads:-

> "13.(1) At any stage of the proceedings thecourt may order to be struck out oramend any pleadings on the ground that -
>
> (a) it discloses *no* reasonable causeof action or defense;
>
> (b)……(c
>
> (d) It is otherwise an abuse of theprocess of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the casemay be.

The Chamber Summons was disposed of by Todd, J. in the following words:-

> "I am satisfied upon the plaint as it now stands and is at present drafted that itdoes show a triable cause or triable issues against the 2nd defendant and for this reasonpara. (a) of the 2nd "defendant's applicationas contained in the Chamber Summons dated16.2.78 is dismissed. If the plaintiff shouldat. any time in the future wish to amend hisplaint as intimated during the

course ofarguments before me at the hearing of thisapplication then that is a matter for him.

As regards paragraph (b) of the 2nddefendant's application dated 16.2.78 I amnot prepared to find that there has been anabuse of the process'of the Court by theplaintiff as alleged, and so this point ofthe 2nd defendant's application is also =dismissed."

The second defendant has appealed. Before us Mr. Pall for the plaintiff asked to be allowed to substitute "seizure" for the word "attachment" in sub-paragraph (B)(a) above which be said was due to a clerical error. I would allow this amendment. The use of the word “attachment" was obviously an in advertent error. The amendment will cause no prejudice or embarrassment to the second defendant as it,nor its agent or servant, had any autority or power to levy the attachment under the conditional order; sub-paragraph (B)(a) now would read:-

"(a) damages together with interest thereonfor wrongful seizure and detention ofthe plaintiff's property;"

Let's understand the principles upon which the court acts when dealing with an application under O.VI rule 13.

"No exact paraphrase can be given but Ithink reasonable cause of action means acause of action with some chance of success when (as required by paragraph(2) of the rule) only the allegations inthe plaint are considered-."

per Lord Pearson in Drummond-Jackson V.B.M.A. (1970) 1 W.L.R. 688 at p. 696.

"A cause of action is an act on the part ofthe defendant which gives the plaintiff hiscause of complaint."

Words and Phrases,Vol, 1 p. 228.

There is some difficulty in affixing aprecise meaning to the term reasonablecause of action[1]..... In point of law,and consequently in the view of a Court of justice, every cause of action is areasonable cause. But; obviously somemeaning must be assigned to the term 'reasonable'..... a pleading will not be struck out unless it is demurrableand something worse than demurrable."

per Chitty J. in Republic of Peru v. Peruvian Guano Company, 36 Ch.Div. 489 at pp. 495 and 496.

"It has been said more than once that therule is only to be acted upon in plainand obvious cases, and, in my opinion,the jurisdiction should be exercised withextreme caution."

per Swinfen Eady, L.J. in Moore v. Lawson and Another,/31 ff.L.lf. 418 at p. 419... 31 T.L.R. 418 at p. 419.

"It is a very strong power indeed. Itis a power which, if it not be mostcarefully exercised, might conceivablylead a court to set aside an action inwhich there might really, after all, bea right, and in which the conduct ofthe defendant might be very wrong, andthat of the plaintiff might be explicablein a reasonable way. Unless it is avery clear case indeed, I think the rule ought not to be acted upon.....

Therefore, unless the case be absolutelyclear, I do not think the statement ofclaim ought to be set aside as notshowing a reasonable cause of action.

We are asked to set it (action)aside, partly on the ground that itdiscloses no reasonable cause of action.I will not decide the case upon thatground, although I think it is mostdifficult to see what is the reasonablecause of action upon the pleadings asthey stand" per Denman, J. in Kellaway v. Bury (1892) 66 L.T. 599 at pp. 600 and 601.

Upon appeal:-

"That is a very strong power, and shouldonly be exercised in cases which areclear and beyond all doubt....the courtmust see that the plaintiff has got nocase at all, either as disclosed in thestatement of claim, or in such affidavitsas he may file with a view to amendments."

per Lindley L.J. ibi, p. 602.

"It has been said more than once that ruleis only to be acted upon in plain andobvious cases and, in my opinion, thejurisdiction should be exercised withextreme caution."

Per Lord Justice Swinfen Eady in Moore v. Lawson and Another (supra) at p. 419.

"It cannot be doubted that the court has aninherent jurisdiction to dismiss an actionwhich is an abuse of the process of thecourt. It is a jurisdiction which ought tobe very sparingly exercised. and only inexceptional cases. I do not think itsexercise would be justified merely becausethe story told in the pleadings was highlyimprobable, and one which it was difficultto believe could be proved". per Lord Herschell in Lawrence v. Lord Norreys, 15. A.C. 210 at p. 219.

"The summary remedy which has been applied tothis action is only applied in plain andobvious cases when the action is one whichcannot succeed or is in some way an abuse ofthe process of the court." per Danckwerts, L.J. in Nagle v. Fielden (1966) 2 Q.B.D. 633 at p. 646.

'It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable. Accordingly it is necessary to consider whether or not this plaintiff has an arguable case. That is the only question that arises on this appeal." per Salmon, L.J., ibi at p. 651.

"It is not the practice in Civil administrationof our courts to have preliminary hearing as it is in crime.... If it involves the parties in the trial of the action by affidavit's is not a plain and obvious case on its face."

"per Sellers, L.J. in Wedlock Maloney and Others (1965) 1 W.L.R. 1238 at pp. 1242.

"This summary jurisdiction of the court wasnever intended to be exercised by a minuteand a protracted examination of documentsand the facts of the case in order to seewhether the plaintiff really has a causeof action. To do that is to usurp theposition of the trial judge, and toproduce a trial of the case in chambers,on affidavits only, without discovery andwithout oral evidence tested by cross-examination in the ordinary way. Thisseems to me to be an abuse of the inherentpower of the court and not a proper exerciseof that power." per Danckwerts L.J. ibi at p. 1244.

"The power to strike out any pleading orany part of a pleading under this rule isnot mandatory, but permissive and confersa discretionary jurisdiction to be exercisedhaving regard to the quality and all the.circumstances relating to the offendingpleading." Rayer Carl Zeiss Stiftung v. Keeler Ltd. and Others (No. 3) (1970) Ch. D. 506.

If there is a sufficient substratum of fact to be implied, the offending paragraph in a pleading ,will not be struck out. Kemsley v. Foot and Others, (1952) A.C. 345.

I would sum up. It is relevant to consider all averments and prayers when assessing under Order 6 rule 13 whether a pleading discloses a reasonable cause of action, and also the contents of any affidavits that may be filed in support of an application that a pleading is otherwise an abuse of the process of the court, for under subrule 13(2) as hereafter set out, while evidence by affidavit is not permitted in the case of the first application,it is permitted in the case of the second application. Sub rule (2) provides:-

"(2) No evidence shall be admissible on anapplication on subrule (l)(a) but theapplication shall state concisely thegrounds upon which it is made."

The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or beingotherwise an abuse of the process of the court. At thisstage the court ought not to deal with any merits of thecase for that 'is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "withoutdiscovery, without oral evidence tested by cross-examination in the ordinary way". (Sellers, L.J. (supra)).As far as possible, indeed not at all, there should be noopinions expressed upon the application which mayprejudice the fair trial of the action or make ituncomfortable or restrict the freedom of the trial judgein disposing of the case in the way he thinks it right.

If an action is explainable as a likely happeningwhich is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminatingit by summary dismissal. Normally a law suit is forpursuing it.

No suit ought to be summarily dismissed unless itappears so hopeless that it plainly and obviously discloses no reasonable *c*ause of action, and is so weak as to be beyond redemption and incurable by amendment. Ifa suit shows a mere semblance of a cause of action,provided it can be injected with real life by amendment,it ought to be allowed to go forward for a court of justice ought not to act in darkness without the fullfacts of a case before it.

On the other hand if there is a point of law which merits a serious discussion the court should beasked to proceed under order XTV" rule 2.

In the instant case before us the second defendant'sapplication stated that the plaint disclosed no cause ofaction against the second defendant while the ruleprovides that a pleading might be struck out, not on theground that it disclosed no cause of action, but on theground that it disclosed no reasonable cause of action.The second defendant's application was therefore incompetent.It was also incompetent because it did not comply withthe requirements of subrule (2) that the application shallstate concisely the grounds upon which it is made. Savefor the bald statement that the plaint disclosed no causeof action-against the second defendant, the applicationmade under subrule 1(a) in this case did not state,concisely or otherwise, the grounds upon which it was made.The learned judge was right in dismissing it.

An affidavit sworn by the General Sales Manager ofthe second defendant Mr. Nozir Ahmed was filed in supportof the second application under subrule (d) that theplaintiff's suit was only an abuse of the process of thecourt. By itself, this part of the application was alsoincompetent for subparagraph (d) requires that thepleading is otherwise an abuse of the process of the court. Counsel engaged himself in redrafting bothsubparagraphs (a) and (d) while preparing theapplication.

Mr. Ahmed deponed that on 9th November, 1976 thesecond defendant was served with the order of conditionalattachment in Civil Case No. 2483 of 1976, that noobjection proceedings were taken by the plaintiff in thatsuit and the order of conditional attachment was neverset aside; that the second defendant's advocates hadpreviously informed the plaintiff's advocate by theirletter of. 20th December, 1976, that they had advised the second defendant that it would be in contempt of court if they released the vehicle while they had knowledge of the order made by the-court.

The second ground of appeal runs thus-that theHigh Court in Civil Case No. 2488 of 1976 on 9thNovember, 1976 made an order for the attachment of theMercedes in the hands of the second defendant" which hadnever been set aside; the order was served on the second-defendant which obeyed it; the order was at all timesa valid order of the High Court; a suit against aparty for obeying a valid order of the High Court is anabuse of the process of the court; further, theplaintiff took no steps by way of objectionproceedings to have the vehicle released; the HighCourt on 19th January, 1977, ordered the seconddefendant to retain the vehicle pending a further orderof the court and the plaintiff did not object.

It is important to bear in mind that the issuenow for decision is whether the plaint is otherwise anabuse of the process of the court. Let this issue notbecome clouded. For this purpose it is equallyimportant to keep

mirrored the averments in paragraphs 10and 12 and the prayer in paragraph 16(B) of the plaint.The two paragraphs of the plaint do not challenge thatan order for the conditional attachment of the Mercedeswas made by the court, indeed paragraph 9 of the plaintsets out the order of conditional attachment, but it is a misreading of paragraph 10 to say that the Mercedeswas in the hands of the second defendant when the orderfor attachment was made or served upon the seconddefendant. On the contrary the averment in paragraph10 is that Mbango without (plaintiff's) authoritycollected the Mercedes from the Nairobi C.I.D.Headquarters together with its registration book andwrongly and without any (plaintiff's) authority tookpossession of the said vehicle. As a reminder, I wouldrepeat that according to paragraph 12 inter alia theMercedes was wrongfully possessed by the secon ddefendant.

If the Mercedes was not in the possession of thesecond defendant then it was not affected when the orderfor conditional attachment was served upon it. IfMbango "collected the Mercedes from the C.I.D. Headquartersin consequence of the second defendant being served withthe order then although neither he nor the second defendant had any right or authority to instruct himto do so, and notwithstanding that Mbango may havebeen acting in the course of his employment, a matterfor evidence later, for the second defendant now isitself saying (ground of appeal 2(d)) that a suitagainst a party for obeying a valid order of the HighCourt is an abuse of the process of the court, thesecond defendant would have been justified in refusingto release the Mercedes by it after the order of thecourt for the conditional attachment of the vehicle wasserved upon it provided it was in its possession then.To disobey the order would have been an act in plaincontempt of the court.

That, however, is not the realpurport of the averments in paragraphs 10 and 12 of theplaint and the prayer for relief against the second defendant. The real purport of those averments and theprayer for relief is for damages for the initial wrongfulseizure and detention of the plaintiff's property whetherthe Mercedes was collected before or after or inconsequence of the service of the order for the conditionalattachment upon the second defendant. The voyage for theplaintiff's cause of action started with the initialwrongful seizure of his vehicle by the second defendant.To constitute detention there must be a positive wrongfulact of dealing with the goods in a manner inconsistent withthe owner's rights and an intention in so doing to denythe owner's right; 38 Halsbury (third ed.) paragraph 1286,pp. 775/776. Salmond on Torts explains, 15th edn. p. 125 -

> "A conversion....14 ("A conversion is an act (or complex seriesof acts) of willful interference, withoutlawful justification, with any chattel ina manner inconsistent with the right ofanother, whereby that other is deprived ofthe use of possession of it. Two elementsare combined in such inteference:
>
> (1) a dealing with the chattel in a mannerinconsistent with the right of theperson entitled to it, and (2) anintention in so doing to deny thatperson's right or to assert a rightwhich is in fact inconsistent withsuch right ....In order to amount to conversion the act done with respectto the chattel must have been one ofwillful and wrongful interference. Hewho interferes with a chattel acts athis own risk...."

The plaintiff cannot be denied the right to presshis suit in court to the effect that Mbango's act incollecting the Mercedes from the C.I.D. Headquarters wasboth wrongful and constituted conversion. The plaintiff'ssuit therefore is not an abuse of the process of the court.

Mr.-Pall asked us to allow him to make certain otheramendments to the plaint. In view of the decision I havereached I do not consider it necessary to deal with them.The plaintiff may apply to amend the plaint as indicatedin the learned judge's ruling.

I would dismiss the appeal with costs.

Potter JA. The facts giving rise to the interlocutory appeal are fully set out in the judgment of Madan JA.

The Memorandum of Appeal contains two grounds upon which it is submitted that the plaint discloses no cause of action. The first (in paragraph 1(a) to (d)) is to the effect that a valid attachment order was

"served" on the appellant (second defendant) company and was obeyed by them and that a suit against a party for obeying a valid order of the High Court does not disclose a cause of action. There is, however, no averment in the plaint that the attachment order was served on the appellant (second defendant) company or that any step was taken to implement the order. It is clearly alleged in the plaint (in paragraphs 7 and 9) that the attachment order was obtained on the strength of information, allegedly

false, supplied by the appellant company's employee Mbango. But it does not follow in my view that when the appellant company refused to release the vehicle, as it alleged in paragraph 12 that it did, that it was acting in obedience to a valid order of the High Court which had been "served" on them or otherwise brought to their attention in a manner which compelled obedience. In my view this objection to the plaint cannot be sustained without recourse to sources of evidence outside the plaint and such recourse is not permissible in the case of an objection under rule 13(1)(a).

The second ground (in paragraph 1 (c)) is that the plaint does not contain any allegations against the appellant company, apart from paragraphs 12 and 14. In paragraph 12, it is alleged that the appellant (second defendant) company wrongfully detained the vehicle, having wrongfully possessed it. Paragraph 14 contains the plaintiff's averment that he suffered loss and damage as a result of the wrongful acts of the defendants.

The plaintiff's claim against the appellant (second defendant) company is expressed in paragraph 16(B) (a) of the plaint to be for "wrongful attachment and detention" of the plaintiff's vehicle. Mr Pall, who appeared for the plaintiff (first respondent), explained that "wrongful attachment" was intended to refer to the alleged collection of the vehicle from Nairobi Area CID Headquarters referred to in paragraph 10 of the plaint. The wrongful "detention" is alleged in paragraph 12 against the second defendant company.

Mr Fraser, who appeared for the appellant (second defendant) company, has submitted that the plaint does not disclose any cause of action based upon the vicarious liability of the appellant company for their employee Mbango, because it was nowhere alleged that he was "acting in the course of his employment." He cited the following passage from *Salmond on Torts* (16th edition page 474):

> "A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (1) a wrongful act authorized by the master, or (2) a wrongful and unauthorized mode of doing some act authorised by the master … In other words, a master is responsible not merely for what he authorises his servant to do, but also for the way in which he does it."

Mr Fraser submitted that the fact that a servant was acting in the course of his employment is a material fact which must be pleaded. Mr Pall submitted that it was sufficient to plead that Mbango was the servant of the appellant company and he relied on *Transport Commissioner v Gohil* [1959] EA 936. (See also *Nyadoi v Railways Corporation* [1974] EA 454 and the cases referred to therein).

For reasons which will shortly appear, I do not think it is necessary in this case to consider to what extent the *Gohil* case or the subsequent cases affect the rules of pleading in Kenya. In *Gohil's* case the decision of the Tanzanian Court appears to have been founded on a pleading precedent imported into the Tanzanian law from the Indian Civil Procedure Code. In that case it was held that it was sufficient to plead, in an action against the defendant owner of a motor vehicle for damage caused by the negligent driving of his servant, that the driver was his servant. Similar precedents are to be found in Bullen and Leake's Precedents of Pleadings (11th edn) at pp 527, 534 and 535.

It seems to me that while it is a fact material to a plaintiff's case that the negligent act of the defendants' servant was committed "in the course of his employment", there is no requirement that those or any specific words appear in the pleading. Order VI rule 3 requires that

> "... every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence …"

It would seem to be sufficient to plead the facts showing employment up to the point where the onus of proof shifts to the defence to disprove it. Thus it would appear to be sufficient to plead against a defendant that he was in his vehicle being driven by his servant who was driving negligently.

It is of interest to compare the two other precedents in *Bullen and Leake* (11th edn). In No 460 at p 582, the plaintiff was standing on a lorry loading bags of sugar which were being lowered by a sling from a warehouse. He was injured by bags which fell as the result of the negligence of his fellow workmen. To ensure the liability of the defendant employer, the pleader saw fit to aver that the plaintiff was "acting in the course of his employment"

but was content to aver that the plaintiff's injuries were caused by the negligence of "the defendants, their servants or agents." On the other hand, in No 458 p 580, where the plaintiff pedestrian was injured by the defendant's horse which was left unattended with a van by the defendant's servant, the pleader thought it necessary in the circumstances of that case to plead that "the defendant's servant in the course of his employment negligently left a horse and van of the defendant's unattended in Oxford Street."

In this case, paragraph 10 of the plaint alleges that the appellant company's employee, Mbango (elsewhere in the plaint described as a sales representative), "collected" the plaintiff's vehicle and "took possession" of it. Paragraph 12 refers to the plaintiff's vehicle as having been "wrongfully possessed" by the appellant company. I consider that it is reasonable to construe those paragraphs as alleging that Mbango took possession of the vehicle in the course of his employment and took the vehicle to the appellant company's premises, where it remained in the possession of the appellant company. This construction is rendered more reasonable, I think, by the fact that the employee Mbango is not joined as a defendant.

If, as may well be the case, the period covered by the collection and delivery of the vehicle by Mbango was a very short one, the cause of action based upon paragraph 10 of the plaint would be comparatively trivial. The wrongful detention alleged in paragraph 12 is alleged against the appellant company.

Accordingly I am of the opinion that the application under rule 13(1)(a) must fail.

In its alternative application under rule 13(1)(d), the appellant company submits that a suit against a party for obeying a valid order of the High Court is an abuse of the process of the court.

In this application, the appellant company may rely on the evidence contained in the affidavit of their General Sales Manager, Nazir Ahmed. According to paragraph 2 of the affidavit, a "certified copy" of the conditional attachment order was "served" on the appellant company on or about November 9, 1976. According to Mr Pall's letter dated November 19, 1976 annexed to the affidavit, the appellant company relied on "a court order" in refusing to deliver up the vehicle to the first respondent (plaintiff). In their letter dated December 20, 1976 annexed to the affidavit, the appellant company's advocates write that "we feel that a court broker should have completed the attachment but we have been forced to advise our client that they would be in contempt of court if they were to release this vehicle while they have knowledge of the order made by the court". In support of that statement, Mr Fraser referred us to *Eastern Trust Company v McKenzie, Mann & Co Ltd* [1915] AC 750, 761 and to *Hadkinson v Hadkinson* [1952] 2 All ER p 567. In the latter case Romer LJ said at p 569:

> "It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction, to obey it unless and until, that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void."

The order for conditional attachment so far as material was as follows:

> "That the conditional attachment of motor vehicle Mercedes Benz 350 SLC registration No KPK 987 belonging to the defendant and lying in the hands of DT Dobie & Company (K) Limited or lying in the hands of the defendant or his agent or servant within the jurisdiction of this Honourable Court be and is hereby issued."

Order XXXVIII rule 7 of the Civil Procedure Rules provides that attachment before judgment shall be made in the manner provided for the attachment of property in execution of a decree. Thus Order XXI rule 38 provides that the attachment of movable property in the possession of the judgment debtor shall be made by actual seizure. Rule 41(1) provides that the attachment of movable property which is not in the possession of the judgment debtor shall be made by a written order prohibiting the person in possession of the property from "giving it over the judgment - debtor."

Rule 41(2) requires that a copy of the order be sent to the person in possession of the property. Rule 41(3) provides that if the person in possession of the property does not lay claim to it under rule 53, the court may make an order for the actual seizure of the property as if it were in the possession of the judgment debtor.

In my view, the first respondent's action against the appellant company should not be treated as an abuse of the process of the court unless at this stage it is plain beyond a peradventure that the action cannot succeed. I have not been persuaded by Mr Fraser that the matter is as plain as that.

I would dismiss this appeal with costs. I would allow the amendment to paragraph 16(B)(a) of the plaint by substituting "seizure" for "attachment". In the circumstances, I do not consider it appropriate to entertain any other application to amend the plaint.

Miller JA. I have had the benefit of reading in draft the judgment of Madan JA in this appeal. I fully agree with it and have nothing useful to add.

As Miller and Potter, JJ.A. agree it is soordered.

Dated at Nairobi this 18th day of March, 1980.

C.B. MADAN

.....

JUDGE OF APPEAL

C.H.E MILLER

.....

JUDGE OF APPEAL

K.D POTTER

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR