IN THE COURT OF APPEAL

AT NAIROBI

(Coram:Law, Miller & Potter JJA)

CIVIL APPEAL NO.10 OF 1979

BETWEEN

DAVID W. NDIRANGU.....APPELLANT

AND

ADIJAH HASSANABDALLA.....RESPONDENT

(Appeal from the High Court at Nakuru, Nyarangi J)

JUDGMENT

This appeal is from an original and a further interlocutory order made by the High Court Nakuru (Nyarangi J) in Civil Suit No 5 of 1979. By plaint filed on January 3, 1979, the present respondent as plaintiff, sued the appellant/defendant claiming the sum of Kshs 53,500 allegedly arising from a cash against a bank cheque transaction to the said amount, the said cheque having proved worthless on presentation. The appellant's filed defence acknowledged the respondent's lodging the said cheque with him on an agreement not to use or deliver it to the named drawee therein,, but denied ever receiving from the respondent the sum of Kshs 53,500 as alleged. The respondent then made an *ex-parte* application to the court, under order XXXVIII of the Civil Procedure Rules praying deposit of the sum of Kshs 53,500 plus costs with the court or in the alternative attachment of certain of the appellant's property before judgment; and upon hearing the application the learned judge ordered the unconditional attachment of the appellant's motor vehicle a Toyota Registration No KDJ 643.

I have deliberately omitted to refer to the affidavit in support of the application for security or attachment at this stage; but the attachment of the appellant's vehicle having issued, he moved the court under section 3A of the Civil Procedure Act and order XXXVIII Civil Procedure Rules seeking the setting aside of the *ex-parte* order of attachment of the vehicle.

In his affidavit in support of the application to set aside the appellant can be seen to have followed the provisions of order XXXVIII with respect to such matters upon which the court is directed to satisfy itself before ordering attachment if at all. Apart from the general averment of a good defence to the plaintiff's claim he further averred (1) that he is a Kenyan citizen holding no passport or travel documents thereby implying that he did not intend to flee the jurisdiction (rule 1) (a) (ii) and (b), (2) that he possesses real property to the value in excess of the amount claimed in the plaint therewith to personally provide security if ordered by the court (rules 2, 4, 5 and 6(1) and in particular that the Toyota vehicle is not his property thereby rendering any attachment potentially useless (rule 10) and that he was not given

opportunity or called upon to show cause nor did the respondent satisfy the court that he was about to dispose of his property; and the order of attachment nevertheless issued.

It would appear that despite the express pointers to the provisions of order XXXVIII emanating from the averments of the appellant's affidavit in support, the learned judge leant heavily on the side of protecting a possible decree in favour of the respondent after the hearing of the pending suit; for his decision in the application was as follows:-

"The plaintiff claimed that the defendant owns the material vehicle and that he intended to sell that vehicle. The defendant's denial of ownership of the material vehicle is relevant. If he doesn't own it, why then bother to have it. The plaintiff has not stated his interest over the material vehicle. He doesn't state that the owner of the vehicle has caused him to make the application the subject matter of this ruling. The plaintiff hasn't come to this court with clean hands. I don't believe the contents of his affidavit. I see no reason for setting aside the *ex-parte* order. The application is dismissed. Costs in the cause."

It is appreciated that the judge confused the defendant with the plaintiff and that twice in the above passage.

With respect to the respondent's application for security or attachment of the appellant's Toyota vehicle the affidavit in support amounted to no more than – that the appellant was served with the summons, that he owns property including the Toyota vehicle, that he intends to sell all his property and conceal the proceeds making the recovery of the suit amount impossible; all upon information believed; and from personal knowledge, that the financial ruin of the respondent was accordingly apprehended. These averments sounded for relief under the provisions of rule 5 of the order whereby the court may direct "that the defendant either furnishes security in such sum as may be specified, to produce or lodge with the court when required the said property or the value of the same or portion thereof sufficient to satisfy the decree or to appear and show cause why he should not furnish security."

By rule 6 of the order, it is upon the defendant's failure to show cause why he should not furnish security, or to furnish the security required within the specified time that the court may order the attachment of the property sufficient to satisfy the decree which may be passed in the suit. The learned judge was in error to order the summary attachment of the vehicle at first instance on the respondent's application without calling upon and requiring the appellant to show cause. The very first ground of appeal therefore succeeds and I would pronounce the initial order of January 22, 1979 a nullity. On the application to set aside that illegal order of January 22, 1979, I can only say that the above stated reasons of the learned judge for dismissing the application, was to say the least, a perpetuation of the first error and based on totally inapplicable reasoning in the premises. I would therefore allow this appeal with costs to the appellant here and in the court below, and order that the attachment of Toyota No KDJ 643 be set aside.

Potter JA. I agree that the order for attachment of the Toyota motor vehicle which was a nullity and should be set aside. I also agree that the appeal should be allowed with costs in this court and below. It has been the melancholy experience of this court that orders for the attachment of a defendant's property before trial of the cause are frequently made without proper adherence to the provisions of the Civil Procedure Rules. This is another such case.

Examination of order XXXVIII rules 5 and 6 shows that the court must move step by step. Before the court can take any action under those rules it must be "satisfied" that the defendant,

"with intent to obstruct or delay the execution of any decree that may be passed against him:-

(a) is about to dispose of the whole or any part of his property; or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court."

The plaintiff in his affidavit deponed that "I have reliable information which information I believe to be

true that the said defendant intends to dispose his properties in a way of sale." In his ruling the learned judge said:-

"There could be some truth in the contents of the affidavit."

Mr Bowry, who appeared for the respondent, very properly conceded that an averment in an affidavit is of little evidential value if it is on information believed and the source is not disclosed. I agree with Mr Varia, who appeared for the appellant, that more than this is required before a court can be "satisfied." If the court is properly "satisfied", the next step is for the court

"to direct the defendant, within a time to be fixed by it either to furnish security, ---------- or to appeal and show cause why he should not furnish security."

This the learned judge did not do and on this ground alone the order is a nullity.

The final step is set out in rule 6(1) where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, the court may order the attachment of property sufficient to satisfy the decree. In my own view the learned judge ordered an attachment of property in this case in total disregard of the provisions of rules 5 and 6.

Law JA. I agree with the judgments pronounced by Miller JA and Potter JA. The learned trial judge (Nyarangi J) on January 22, 1979, ordered the attachment of a motor vehicle, on an *ex parte* application for attachment before judgment, without directing the defendant/appellant either to furnish security, or to appear and show cause why he should not furnish security, in breach of order XXXVIII rule 5. This purported attachment was a nullity, as property cannot be ordered to be attached before judgment at the instance of a plaintiff unless the defendant is given an opportunity to show cause why he should not furnish security, or fails to show cause, or to furnish the required security, see rule 6. See also Forms Nos 5 and 7 in Appendix E to the Civil Procedure Rules. The defendant/appellant applied to have this order of attachment set aside, but the learned judge on March 14, 1979, refused to set aside the *ex-parte* order. An order of attachment before judgment can only be made after notice to the defendant. In this case no notice was given, although the defendant had entered an appearance in the suit. As I have said, the order of January 22, 1979, was a nullity, and should have been set aside when its irregular nature was pointed out to the learned judge on the application to set that order aside. As Potter JA agrees, it is ordered that this appeal be allowed, and there will be an order in the terms proposed by Miller JA.

Dated and Delivered at Nairobi this 14th day of October 1980.

E.J.E.LAW

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JUDGE OF APPEAL

C.H.E.MILLER

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JUDGE OF APPEAL

K.D.POTTER

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR