IN THE COURT OF APPEAL

AT NAIROBI

(Coram:Madan, Wambuzi & Law JJA)

CIVIL APPEAL NO. 10 OF 1977

BETWEEN

BRAR.....APPELLANT

AND

WARENG QUARRY & ACHARE CONSTRUCTION.....RESPONDENTS

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

JUDGMENT

This case bristles with irregularities. It concerns a Toyota Pickup vehicle No KLP 897 which together with a lorry and two mixing machines were seized by Western General Auctioneers the official court brokers at Eldoret under a warrant of attachment and sale of property dated November 13, 1975, issued by the district registry, High Court, Eldoret, in execution of the decree of Kshs 6,115 in its Civil Case No 248 of 1975 obtained by the first respondent against the second respondent. The warrant of sale of property enjoined upon the court brokers to sell the judgment-debtor's property by auction after giving 30 days previous notice by affixing the same in the court house, and making due proclamation of the sale.

According to one notice of attachment and proclamation of sale issued by the court brokers (undated but bearing the court date rubber stamp November 14, 1975) the attached goods inventoried as one Toyota KLP 897, one lorry KNK 307 and two "mixtures machines" stated to be all worth Kshs 50,000, were advertised for sale by public auction on November 29, 1975. A second notice of attachment and proclamation of sale also issued by the court brokers (also undated but bearing the court date rubber stamp November 25, 1975), the attached goods stated to be only one Toyota KLP 897 and one lorry KMK 307 (KNK 307), still worth Kshs 50,000, were advertised for sale on November 26, 1975, but with a marginal note stating that the sale would take place on November 29, 1975. A third similar notice shown by the official date rubber stamp to have been received in the law courts, Eldoret, on January 2, 1976, lists all three items of attached goods shown in the first notice for sale on November 26, 1975, but the value of the whole lot is put at Kshs 45,000. All these three notices seem to bear the signature of the official court broker, Mr SC Nakamet trading as Western General Auctioneers.

On December 3, 1975 the court brokers forwarded to the court their cheque for Kshs 6,115 stating in their accompanying letter "being the decretal amount after the sale of the attached goods". On December 19,

1975 the court brokers sent another cheque for Kshs 7,335 to the Deputy Registrar, Eldoret, with a letter which stated it was the balance of the proceeds received from the sale of the goods attached in the suit referred to without naming the goods and without also any explanation why it was not forwarded together with the sum of Kshs 6,115.

The appellant claiming to be the owner of the Toyota gave notice of objection on December 1, 1975, under rule 53 of order XXI of the Civil Procedure (Revised) Rules, 1948, to attachment of the Toyota and in his affidavit he deponed the value of the Toyota to be Kshs 25,000. The court on the same day, ie December 1, 1975, but forgetful of the two notices of attachment and proclamation of sale it had received from the court brokers on November 14 and 25 served on the court brokers an order staying the sale pending further order of the court. This order for stay as well as the appellant's notice of objection came too late. The court brokers had sold the Toyota on November 26, as evidenced by their letter of December 8, addressed to the advocates of the attaching creditor. The letter also stated that the money had been paid into court. This was not wholly true for part of the money was not paid into court until December 19.

The court further invited the attaching creditor to intimate whether it proposed to proceed with the attachment and sale of the Toyota (rule 54). The attaching creditor intimated in writing to the court that it proposed to proceed with the attachment, and the court thereupon directed the objector (appellant) to take proceedings to establish his claim (rule 56).

The appellant issued a summons instituting proceedings (rule 57). He produced to the court the registration book of the Toyota and also a certificate from the Registrar of Motor Vehicles both of which documents show that the appellant is the registered owner of this vehicle.

Under his summons the appellant asked for orders for the Toyota to be declared his property, any purported sale of the Toyota under the warrant of attachment and sale dated November 13, to be declared unlawful and set aside, and the Toyota to be forthwith released unto the appellant.

At the hearing of the appellant's summons the learned judge did not proceed to hear evidence to establish the appellant's ownership of the Toyota which in view of the evidence of the registration book would not seem to have been necessary in as much as under section 6(5) of the Traffic Act, cap 403, the registration book is issued to the owner of a vehicle, and under section 8 of the same Act, the person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle. The advocate for the attaching creditor referred to rule 69 and said the vehicle having been sold the way was open to the appellant to sue the court broker for damages. Without an inquiry having been held by the court as to the ownership of the vehicle, counsel also asked the learned judge to dismiss the appellant's application. The learned judge dismissed the appellant's summons in the following words:

"I am satisfied that order 21 rule 69 of the Civil Procedure (Revised), Rules, 1948, here applies. The applicant may if he wishes invoke that provision of the law and institute a suit against the relevant party. The application is dismissed with costs".

The purpose of instituting proceedings under rule 57 is to provide the objector with an opportunity to establish his claim to the attached movable property. If he is able to do so and also that the judgment-debtor has no attachable interest in it the attached movable property should be ordered to be released to the objector, otherwise I suppose the execution proceedings would take their course. The learned judge by not proceeding to hear evidence to establish the objector's ownership of the attached movable property deprived him of his right to do so conferred by rule 57. The prime object of rule 57 was thus defeated. It is the duty of the court to make a finding under rule 57 about the ownership of attached movable property even if the property has been sold.

The appellant has appealed to this court against the learned judge's abovequoted ruling. He has asked us to make a declaration that the evidence before the learned judge showed that the Toyota was the property of the appellant on the day it was attached and seized, and he should be allowed all costs of the objection proceedings as well as costs of this appeal. On the other hand, counsel for the respondent (attaching creditor) has submitted that the learned judge could not have decided the ownership of the vehicle in view

of the provisions of rule 69 and he has asked us to dismiss the appeal with costs. Rule 69 reads:

"69. No irregularity in publishing or conducting the sale of movable property shall vitiate the sale; but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit against him for compensation, or (if such person is the purchaser) for the recovery of the specific property and for compensation in default of such recovery."

Learned counsel for the appellant has submitted that this rule has no application to the circumstances of this case. I do not find it necessary to decide whether that is so. However, in view of the overwhelming evidence of the registration book, the certificate by the Registrar of Motor Vehicles, and the provisions of section 6(5) and 8 of the Traffic Act which I have quoted I have no hesitation in holding that Toyota Pickup motor vehicle No KLP 897 is shown to be the property of the appellant on the date of attachment, and also that on that date it was not the property of the judgment-debtor and therefore it was not liable to attachment and sale in Civil Case No 248 of 1975. As no attempt was made to prove the contrary before the learned judge, while it may not have been open to him to grant all the reliefs asked for by the appellant in his summons he could and should have made a finding that the Toyota was the property of the appellant without feeling the need for any further evidence if he did instead of dismissing the application before him with costs for which there was no warrant as the appellant was faultless and he had meticulously followed the procedure laid down relating to objection proceedings. His application should have been allowed with costs at least to the extent that he had established his claim to the attached property.

I must add that the registry of the High Court at Eldoret should have taken immediate note that the Court Brokers were proposing to sell the Toyota by public auction before the expiry of 30 days. The Deputy Registrar might well have enquired of the Court Brokers why items of property worth Kshs 50,000 or Kshs 45,000 were attached when the decretal amount to be realized was only Kshs 6,115. The Deputy Registrar might also have taken note that to date the Court Brokers have not filed in court any account of the sale of the Toyota by public auction or otherwise giving, for example, the actual date of the sale, the purchase price, the name of the purchaser and the amount of commission charged by the Court Brokers. It is all in the dark. Learned counsel for the appellants told us that his instructions were that the Toyota was never sold at a public auction. Be that as it may, the circumstances connected with the execution proceedings are highly suspicious and may well bear an investigation by authority concerned. In my opinion this appeal succeeds. As the other members of the court agree, it is ordered that the appeal be allowed with costs against the first respondent. The order the subject of this appeal is rescinded, and an order that the Toyota Pickup No KLP 897 was not the property of the judgment-debtor and therefore not liable to attachment and sale is substituted. The appellant is awarded the costs of the objection proceedings against the judgment-creditor, who is the first respondent.

Wambuzi JA. I have had the benefit of reading in draft the judgment prepared by Madan JA and I agree that this appeal must succeed.

The only issue before us is whether the learned judge in the court below should have inquired into the ownership of the Toyota Pickup vehicle No KLP 897 and made a finding as to whether or not the vehicle was liable to attachment. It is a little surprising that the court broker should have ignored the set procedure in handling these matters but it seems clear that at the time the chamber summons following the notice of the objection to attachment was heard the vehicle had been sold and the money or some of it deposited in court. Rule 53 of order XXI provides:

"Any person claiming to be entitled to or to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to the decree-holder of his objection to the attachment of such property."

It would appear, therefore, that the objection was in time. In the case of immovable property, any person with a similar claim may apply to the court to have the sale set aside under rule 78 of that order. I cannot find any comparable provision in the case of movable property, and accordingly not only is it doubtful

that in this case the court could have set aside the sale as prayed by the appellant but it is not clear what order the court is supposed to make in the circumstances of this case when movable property has in fact been sold before the objection. Be that as it may, it is my view that as rule 53 stands, the court must at least say whether or not the property in question was or was not liable to attachment. If the court finds that the property was not liable to attachment it would then be open to the aggrieved party to seek the appropriate remedy which may be an action to recover damages against those concerned. In this connection our attention was drawn to rule 58 of the same order which provides that should the objector fail to file proceedings to establish his claim within the specified time, his objection shall be deemed to be waived and the attachment and consequential execution shall proceed. The same rule provides also that unless the court otherwise orders, the judgment creditor may enter judgment against the objector for the costs occasioned by the objection. This in my view is further indication that the sale of the property prior to the notice of objection is no bar to bringing objection proceedings and that the court must inquire into the matter. It was therefore wrong for the court below to dismiss the objection proceedings with costs apparently merely because the vehicle had been sold. I accordingly concur in the order proposed by Madan JA.

Law JA. I have had the advantage of reading in draft the judgment prepared by Madan JA. I am of the view that the appellant's claim to be the owner of Toyota pick-up KLP 897, which was not disputed, entitled him to an order that the vehicle was not the property of the judgmentdebtor and was not therefore liable to attachment and sale in execution of the decree obtained by the first respondent against the judgment-debtor. I agree that this appeal should be allowed, and I concur in the order proposed by Madan JA.

Dated and Delivered at Nairobi this 16th day of January 1978.

C.B.MADAN

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JUDGE OF APPEAL

S.W.W.WAMBUZI

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JUDGE OF APPEAL

E.J.E.LAW

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JUDGE OF APPEAL

I Certify that this is a true copy

of the original.

DEPUTY REGISTRAR