



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA

AT KISUMU

Civil Appeal 31OF 2002

KURONYA AUCTIONEERS..... APPELLANT

AND

MAURICE O. ODHOCH..... 1<sup>ST</sup> RESPONDENT

NATIONAL BANK OF KENYA LTD..... 2<sup>ND</sup> RESPONDENT

*(Appeal from the judgment and order of the High Court of Kenya at Kisumu (Tanui, J) dated*

*28<sup>th</sup> November, 2001 In H.C.C.A. NO. 130 OF 2001)*

JUDGMENT OF THE COURT

The appellant is **Kuronya Auctioneers**. This entity (we are not sure whether it is a proprietary firm or a partnership) (*hereinafter called "the auctioneer"*) was sued by the first respondent, **Maurice Odhoch** (*Maurice*) in the Chief Magistrate's Court at Kisumu on 27<sup>th</sup> June, 2000. His claim was based on alleged wrongful attachment of his goods by the auctioneer. The auctioneer was instructed by the second respondent, National Bank of Kenya Limited (the Bank) to attach goods belonging to one

*ErastusMwanga* to satisfy a decree obtained by the Bank against *Erastus Mwanga* in Busia Senior Principal Magistrate's Court in its *Civil Case No. 576 of 1994*

.Whilst being armed with warrants of attachment issued by the said Busia court the auctioneer attached goods belonging to *Maurice* in purported execution of the decree. *Maurice* objected to the attachment pursuant to the provisions of *Order XXI* rule 53 of the *Civil Procedure Rules*. The objection was dismissed by the Busia Court. *Maurice* appealed against the dismissal to the High Court. That court overruled the Busia court, allowed the appeal and upheld the objection by *Maurice*. That was in *Kisumu H.C Civil Appeal No. 19 of 1996*

*Maurice* thereafter filed the suit which we referred to at the beginning of this judgment. The auctioneer lodged its defence and thereafter gave notice of three preliminary points of objection to the first respondent's claim as follows-

.-"TAKE NOTICE that the 2nd defendant (the auctioneer) will raise a preliminary objection to the hearing of this suit as the same is misconceived, bad in law and cannot lie and should be struck out for reasons inter alia.

1. *THAT the instant suit as filed is barred by express provisions of Section 34 of the Civil Procedure Act in that the issue of unlawful attachment as alleged by the plaintiff [Maurice] are matters that arise out of execution of the decree in BUSIA SRMCCC NO. 576 of 1994 and being either between the same parties and or their agents.*

2- *THAT the suit is expressly barred by provisions of Section 7 of the Civil Procedure Act as the matter in dispute having been the same or substantially the same in BUSIA SRMCCC NO. 576 OF 1994 hence this case is res judicata.*

3. *THAT the present suit is barred by express provisions of Section 6 of the Judicature Act Cap 8 of the Laws of Kenya."*

We note that none of these issues were raised in the auctioneer's defence. However as the preliminary objection was heard, we will not comment on the lack of pleadings as nothing turns on them in this appeal.

The Senior Resident Magistrate, *F.M. Omenta Esq.* who heard the preliminary objections ruled that Maurice ought to have filed his claim in Busia SRMCCC No. 576 of 1994. He also ruled that the auctioneer was protected as he acted on court orders and could not be held liable for his acts of omissions *and* commissions. Unfortunately, the magistrate did not give any reasons for his decision.

Maurice was not satisfied with the ruling of the magistrate and lodged an appeal against it. That appeal - *Civil Appeal No. 130 of 2001* was heard by the superior court (*Tanui, J*). The appeal was allowed and it was ordered that the file be placed before Kisumu Chief Magistrate's Court for trial and disposal. The auctioneer was dissatisfied with those orders of the High Court and is now before us appealing against the said orders.

In his first ground of appeal the auctioneer takes issue with the learned Judge that he erred in failing to find that *Maurice's* suit was barred by *Section 34* of the *Civil Procedure Act*, which section reads as follows: -

*"34(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.*

(2) *The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.*

(3) *Where a question arises as to whether any person is or is not the representative of a Party, such question shall, for the purposes of this section, be determined by the court."*

*Section 34* allows the parties to a suit in which the decree was passed to have determined, in that suit, all questions relating to execution, discharge or satisfaction of the decree. It does not talk of damages payable to a person against whom a decree is executed when he is not the judgment — debtor. For the purposes of compensation for the torts of wrongful execution or trespass the wronged party cannot be said to be a party to the original suit as such a claim does not relate to execution, discharge, or satisfaction of

the decree. The first ground of appeal therefore fails.

The second ground of appeal is as follows:-

*"2. That the learned Judge erred in law in replying on the Auctioneers Act (Act NO. 5 of 1996) in determining the appeal before him when the same was not applicable to the circumstances of the case".*

It is correct to state that The Auctioneers Act (Act No. 5 of 1996)

did not exist when the execution was levied against *Maurice's* goods. It is also correct to state that *Act No. 5 of 1996* is not retrospective in operation. *Mr. Wanga* who argued this appeal on behalf of the auctioneer is right in saying that the learned judge erred in applying Section 26 of Act No. 5 of

1996 to hold the auctioneer liable. However, this misdirection by the learned Judge cannot affect the result of the appeal as the auctioneer is, in any case, liable to the wronged party at common law as will be seen hereinafter.

The most serious argument advanced by *Mr. Wanga* was to the effect

that *Section 6* of the *Judicature Act, Cap 8, Laws of Kenya* protects the

auctioneer against even a wrongful execution. The relevant part of that

section 6 reads where material:-

*"And 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."*

*Mr. Wanga* did not show us any authority suggesting that all actions of an auctioneer are protected. He relied on the case of *Davis & Shirtliff Ltd vs. The Attorney General* (1978) KLR 272 for his contention that all actions of a court broker are protected under *Section 6* above. That case only decided that no action lies against the government for anything done or omitted to be done in the course of the execution of judicial process and that the government could not be held liable for defalcations by an

auctioneer. It did not decide that an auctioneer is not liable for whatever he does during the course of execution of warrants.

The question that falls for our consideration in this aspect of the appeal is this: "If an auctioneer attaches the goods of a wrong party when he is armed with a warrant to attach the goods of a specified party can he claim the immunity given to him by *section 6* of the *Judicature Act*?"

That issue was decided in the case of *Simiyu vs. Sinino* [1982-88]

IKAR 630. That case decided that a party who sets in motions the process

of execution against a wrong person, even though not maliciously, becomes

liable at common law for damages for trespass and wrongful execution.

*Hancox, J A* (as he then was) stated at page 636:

*"I would therefore hold that the respondent, as the only party before us on this appeal, is liable to the appellants in damages for trespass for the wrongful attachment of his goods."*

*Chesoni Ag. J.A* (as he then was) and *Nyarangi, Ag. J.A* (as he then was) concurred with the holding of

*Hancox J A.*

The ratio decidendi of the *Simiyu* case is that if the execution is levied against a wrong party that party has a right of recourse against the

auctioneer as well as the decree-holder despite the protection given to the auctioneer by Section 6 of the Judicature Act and that such recourse is at common law. It stands to reason to say that *Section 6*, cannot provide protection to an auctioneer who attaches the goods of a wrong party. He may have some other valid defence but he cannot succeed in having the suit against him thrown out *in limine* on the basis of *Section 6* if he executes the warrants against a wrong person.

The last ground of appeal is that Busia *SRMCCC No. 576 of 1994*

had decided the issue relating to the attachment of Maurice's goods and hence the suit was barred by the provisions of *Section 7* of the *Civil Procedure Act*. What that suit and the appeal lodged by Maurice decided was only that the attachment was wrongful. It did not decide the issue of whether the auctioneer was liable in damages for wrongful attachment; nor did it decide the question of what damages would Maurice be entitled to. These are the issues to be determined by the Chief Magistrate at Kisumu. Those issues cannot be *res judicata*.

The upshot of all this is that we see no merit in grounds 1, 3 and 4 in the memorandum of appeal and we are of the view that despite the wrongful reliance on *Section 26 of Act No. 5 of 1996* in the end the

learned Judge arrived at a correct decision. This appeal is therefore dismissed with costs.

***Dated and delivered at Nairobi this 9th day of July 2003.***

***R.S.C. OMOLO***

***JUDGE OF APPEAL***

***A.B. SHAH***

***JUDGE OF APPEAL***

***E. OWUOR***

***JUDGE OF APPEAL***