



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(Coram: Madan, Law JJ A & Miller Ag JA)**

**CIVIL APPEAL 21 OF 1978**

**Between**

**DAVIS & SHIRTLIFF LTD .....APPELLANT**

**AND**

**ATTORNEY-GENERAL.....RESPONDENT**

**JUDGMENT**

This appeal turns upon the interpretation of section 4 of the Government Proceedings Act, by virtue of the provisions of which the Attorney- General was made a party as the defendant in the High Court. We are told that this is a test case. What happened was as follows:

The appellant filed a suit in the High Court against the Attorney- General as representative of the Government of the Republic of Kenya, claiming payment of Shs 69,040/75, which amount was recovered for and on behalf of the appellant by a firm of court brokers called Mbaru Auctioneers and Official Brokers (described in the plaint as the agent of the High Court), by levying attachment against the assets of the judgment debtor in High Court Civil Case 1101 of 1975 in which the appellant was the judgment creditor. The execution was complete (though I doubt that this has any significant bearing in this case) when the court broker received the proceeds of sale of the attached moveable property, whereupon he held the money to the use of the appellant as the judgment creditor. Mbaru would seem to have converted the money recovered by them to their own use, thereby committing a tortious act as they did not pay it either into Court or to the appellant as the judgment creditor.

The appellant's plaint in the High Court stated that the appellant claimed the said sum as money had and received by the Attorney-General to the use of the appellant, and/or, in the alternative, money converted by the Attorney-General's agent.

The appellant's plaint was ordered to be struck out as disclosing no reasonable cause of action against the Attorney General because of the provisions of section 4(5), which read:

No proceedings shall lie against the Government by virtue of this section in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process.

Mr Couldrey for the appellant has argued the appeal with skill. It seems to me that the gravamen of his argument is that, once the execution was complete, the court broker's function of discharging

responsibilities which he had in connection with the execution of judicial process ceased, and thereafter he merely had to perform the administrative function of paying over the money received by him. The Government was therefore no longer protected by section 4(5). I cannot accept this argument. I think that a court broker continues to function in the discharge of the responsibilities which he has in connection with the execution of judicial process until he actually pays over the proceeds of execution; and no proceedings lie against the Government in respect of anything done or omitted to be done by him meanwhile.

There is another reason also why this appeal must fail. With respect, I agree with Simpson J that the court broker was an agent of the court. The tortious act of conversion of the money must be deemed to have been committed by the Court itself inasmuch as it was committed by an authorised agent of the Court in the course of its duty. Quite apart from the position that in the final analysis the Court can do nothing wrong, the Court is a "person" within the meaning of section 4(5) (*vide* the definition of "person" in section 3(1) of Interpretation and General Provisions Act).

Therefore, no action lies against the Government for (in this case) anything done or omitted to be done by any person (in this instance the Court) while discharging its responsibilities in connection with the execution of judicial process.

In order to function freely and effectively, Courts of justice must be free from harassment of litigious involvement arising from the *bona fide* discharge of their responsibilities, not only in connection with the execution of judicial process but generally in connection with their task of administering justice. The appellant must look for redress elsewhere.

I would dismiss this appeal with costs. As Law JA and Miller Ag JA agree, it is so ordered.

**Law JA.** I agree with the judgment delivered by Madan JA and concur in the order proposed by him.

I would only mention one point, and that is whether or not the execution had been completed. Simpson J, following a *dictum* by Lord Denning MR in *Re Overseas Aviation Engineering (GB) Ltd* [1962] 3 All ER 12, said, "I find that such execution is not completed until payment is made to the judgment creditor." What Lord Denning said was that an execution was completed *in fact* when the creditor gets his money. He was then dealing with section 325 of the English Companies Act 1948, which distinguishes between an execution which the creditor has completed in fact and one which has been deemed to have been completed. No such distinction needs to be drawn here. In this case the goods were seized under an order of the court. They were sold, and the proceeds of sale received by the court broker. Those proceeds then became money had and received on behalf of the judgment creditor, and were recoverable by him as such. In these circumstances, I entertain no doubt that the execution was complete. Once he had received the proceeds of sale, the court broker held the money for and on behalf of the judgment creditor and was accountable to him for it. Unfortunately, the court broker dishonestly converted the money to his own use. As the judge held, the court broker was acting as an agent of the court and therefore of the Government. As to whether the Government is liable for this tort, it is with some regret that I agree with Madan JA and with Simpson J that the Government is exempted from liability under the provisions of section 4(5) of the Government Proceedings Act.

The court broker, in failing to pay over the proceeds of sale, was omitting to discharge a responsibility which he had in connection with the execution proceedings, and it seems to me to be immaterial whether the execution had been completed or not.

**Miller Ag JA.** I agree with the judgment of Madan JA and the orders made in connection therewith and have nothing to add.

*Appeal dismissed with costs.*

Dated and delivered at Nairobi this 14th day of December 1978

**C.B MADAN**

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**JUDGE OF APPEAL**

**E.J.E LAW**

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**JUDGE OF APPEAL**

**C.H.E MILLER**

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**AG JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**