



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: LAW J A)

CIVIL APPEAL NO 33 OF 1976

ROGAN KAMPER.....APPELLANT

VERSUS

LORD ROBERT GROSVENOR.....RESPONDENT

RULING

(Appeal from a Judgment of the High Court at Nairobi, Chanan Singh J in High Court Civil Case No 786 of 1971 dated 31st July 1975)

April 27, 1978, **Law JA** delivered the following Ruling.

This reference from a decision of the Registrar as a taxing master involves points of considerable complexity which do not appear to be directly covered by authority.

I have before me Mr Fraser, representing Lord Robert Grosvenor the unsuccessful respondent in Civil Appeal No 33 of 1976, (*A W Rogan Kamper v Lord Robert Grosvenor*), and I will refer to him as “the landlord”; Mr Pabary who represents the successful appellant Rogan Kamper, to whom I will refer as “the tenant”, and Mr Ole Keiwua who represents the Chief Collector of Income Tax, to whom I will refer as “the Collector”.

The tenant had deposited in the Registry of the former Court of Appeal a sum of shs 22,000/- as security for the costs of the appeal. This sum consisted of the normal security of shs 2,000/- required by rule 104(1) of the Rules of this Court, and of shs 20,000/- being further security ordered by this Court to be given under rule 104(3), as the tenant was not then resident within the jurisdiction. On the 7th July, 1977, the appeal was allowed, and Mr Pabary on the same day wrote to the Registrar asking that the security be repaid to the tenant in conformity with the decision of the Court, under rule 104(4). Although the landlord had failed in the appeal, one of the holdings in the judgments delivered by the Court was favourable to him. It was to the effect that the tenant had not surrendered part of the suit premises, as he claimed to have done. The landlord accordingly, on the 11th July, 1977, filed a suit (HCCC 1532/77) claiming arrears of rent of shs 165,000/- and on the same day applied under Order 38 rules 1 and 5, for conditional attachment of various sums of money deposited by the tenant in the High Court and the KShs 22,000/- deposited by him in the Court of Appeal, which sum was still lying in the Registry on 11th July. The High Court made the order of conditional attachment on the 11th July, and it was served on the Registrar of the Court of Appeal on the same day. The effect of the order for conditional attachment was to prevent the tenant from disposing of the sums attached, including the Kshs 22,000/-the subject of this reference, until

further order of the High Court. On 2nd August, 1977, the Collector issued a notice, which was served on 4th August, appointing the Registrar under section 96 of the Income Tax Act as agent for the tenant for the payment of tax in relation to the money held in the Court of Appeal, that is to say the Kshs 22,000/- the subject of this reference. The tenant owed the Collector Kshs 91,454/- under assessment which were not challenged by any appeal. On the 1st December, 1977, the landlord obtained judgment in HCCC 1532/77 for the amount claimed, and on 14th December, the High Court confirmed the landlord's conditional attachment by ordering, under order 38, rule 11, that the security of shs 22,000/- lying in the Registry of the Court of Appeal be transferred to the High Court for payment out to the landlord as judgment creditor. This order was served on the Registrar of the Court of Appeal on the 5th January, 1978. The position on that day, so far as the Registrar was concerned, was that there were three conflicting claims to the Kshs 22,000/- deposited in his Registry. There was the tenant's claim, under rule 104(4) of the Rules of this Court. There was the landlord's claim as a judgment creditor under his decree of 1st December, and under the conditional attachment of 11th July, which became absolute when confirmed on 14th December. There was the Collector's claim under his notice of 2nd August. The Registrar decided to request these interested parties to appear before him on a date agreed by them all, which was 30th January, 1978. On that day the tenant did not appear nor was he represented. I allowed Mr Pabary to appear and be heard on this reference, as I was satisfied that his failure to appear before the Registrar was due to a clerical error in this office. I am of the opinion that his client, the tenant, has no valid claim to the shs 22,000/- lying in the Registry. His right to dispose of that money terminated when the money was conditionally attached, an attachment which is now absolute. The rival claimants are now reduced to two, the landlord by virtue of the attachment and as judgment creditor and the Collector by virtue of his notice under section 96 of the Income Tax Act. The Registrar, rightly in my view, decided that the matter fell within the proviso to Order 21 rule 57, which reads as follows:-

“Provided that, where such property (meaning property under attachment) is in the custody of the court, any question of title or priority arising between the decree holder and any other person, not being the judgment debtor, claiming to be interested in such property by virtue of any assignment or otherwise, shall be determined by such court”.

The Registrar correctly directed himself, in conformity with the decision in *Shah Jivraj Hira and Sons v M K Gohil* [1960] E.A 922, that a notice appointing an employer as agent for the collection of tax takes effect in the nature of a statutory assignment, and that it has priority over a subsequent attachment. He further held, following *Bisheshar Das v Ambika Prasad* (1915) Ind Law Rep (Allahabad) 575, that the attachment before judgment only had the effect of preventing alienation of the attached property and did not confer any priority on the attaching creditor over a subsequent decree-holder, and he held that the Collector's right flowing from the notice of 2nd August prevailed over the landlord's conditional attachment of 11th July, so that he was bound to satisfy the Collector's claim by paying the KShs 22,000/- to the Collector in satisfaction of his claim against the tenant for tax due and owing. From this decision the landlord has brought this reference.

Mr Fraser for the landlord submitted firstly that the Collector's notice of 2nd August did not fall within section 96 of the Income Tax Act. The duty of an agent appointed by the Collector (or Commissioner) under section 96(2) is, under sub-section (3), to pay the tax out of any moneys which may be held by the agent for his principal. Mr Fraser pointed to the definition of the word “moneys” in section 96(1), which reads:-

“ ‘Moneys’ includes salary, wages and pensions payments and any other remuneration whatsoever.”

And he submitted that a notice under section 96 could only be made in relation to moneys in the nature of remuneration, so that the notice in this case, which related to a sum of money deposited in court as security, was invalid and without effect. On this point, I incline to the view propounded by Mr Ole Keiwua, that the definition of moneys is not exclusive; it “includes” remuneration but is not stated to “mean” remuneration only. The definition is not happily worded, but in my opinion it should be read as follows:-

“ ‘Moneys’ means money held by an agent on behalf of a principal, and includes salary, wages and pensions payments and any other remuneration whatsoever.”

The next point to be considered is whether, in terms of Order 38 rule 10, the Collector had rights existing prior to the attachment which were not affected by the attachment. That rule reads as follows:-

“10. Attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree.”

Mr Ole Keiwua submitted that the Collector had rights existing prior to the attachment before judgment. These rights flowed from the unappealed assessments, and consisted of the right to sue for unpaid tax, under section 101 of the Income Tax Act, or to issue a notice under section 96, or to levy distress under section 102, or (in the case of land) to issue a notice under section 103, and these rights existed before the attachment. Mr Fraser’s reply to this submission is that these rights are rights to recover a debt, they are rights against the tax-payer *in personam* and not rights *in rem* relating to any particular item of the tax-payer’s property. Having selected the remedy under section 96, it was not until the Collector issued his notice on 2nd August that his right in relation to the money in court crystallized and became a right within the meaning of Order 38 rule 10.

Mr Fraser relied in this respect on the case of *Registrar of Titles Johore v Temenggong Securities Limited* [1976] 2 WLR 951 in which it was held that a claim for unpaid income tax was an unsecured civil debt which until converted into a judgment debt gave no right in or over the property of a debtor. I respectfully adopt that statement of the law, and applying it to the facts of this case I am of the opinion that the Collector acquired no right in or over the tenant’s property presented by the Kshs 22,000/- deposited in the Registry until he issued the notice of 2nd August. I accordingly hold that Order 38 rule 10 does not help the Collector, as he had no right existing prior to the attachment in relation to the Kshs 22,000/-

This brings me to the final and crucial matter for decision, and that is whether the Registrar was correct in holding that, under Order 21 rule 47, the Collector had a title or priority to the Kshs 22,000/- which prevailed over the landlord’s right under the conditional attachment. In so doing, the Registrar adopted the decision in *Bisheshar Das v Ambika Prasad* (supra) that the effect of an attachment before judgment was to prevent alienation and did not confer any priority of title on the attaching creditor. I do not dispute the correctness of that decision, which as I understand it establishes no more than that a decree-holder can levy execution on goods which are subject to a prior attachment before judgment. This is recognized in Order 38 rule 10, which lays down that an attachment before judgment does not bar the right of a decree-holder. But as Mr Fraser pointed out, the Collector is not a decree-holder. He is the assignee of money owing by a tax-payer which are held by an agent, which the agent is bound to pay to the Collector. This right by way of assignment did not come into existence until the notice was issued on 2nd August, and was accordingly not a right “existing prior to the attachment” in the terms of Order 38 rule 10. I agree with Mr Fraser’s submission in this respect.

For these reasons I find myself constrained to differ from the decision of the Registrar. In my opinion the Collector had no right existing prior to the attachment, to the Kshs 22,000/-, such as to entitle him to priority over the landlord’s right arising out of the attachment. I hold that the Kshs 22,000/- must be transferred to the High Court, as ordered by the High Court on 14th December, 1977, for payment out to the landlord as judgment creditor. I allow this reference. Costs have not been asked for by either Mr Fraser nor Mr Ole Keiwua against the tenant, so I order that the costs of this reference, and of the application before the Registrar, be paid by the Collector to the landlord.

April 27, 1978

LAW JA