



Case Number:	Civil Appeal 70 of 1982
Date Delivered:	17 Jun 1983
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Alister Arthur Kneller, Kenneth D Potter
Citation:	Industrial & Commercial Development Corporation v Onyando & 3 others[1983] eKLR
Advocates:	KM Muli for Appellant SM Munikali for Respondents
Case Summary:	<p><b>Industrial &amp; Commercial Development Corporation v Onyando</b></p> <p><b>Court of Appeal, at Nairobi</b></p> <p><b>June 17, 1983</b></p> <p><b>Simpson CJ, Potter &amp; Kneller JJA</b></p> <p><b>Civil Appeal No 70 of 1982</b></p> <p><i><b>Execution</b> - stay of execution - stay pending appeal - power to grant stay by court's own motion - nature of power - exercise of discretion - notice to show cause why execution should not issue - requirement of - applicable rules - Civil Procedure Rules order XXI - Civil Procedure Act (cap 21) section 3A.</i></p> <p><i><b>Execution</b> - attachment and sale - notice to show cause - circumstances in which notice may be dispensed with - power of court to order stay of execution - when such power may be exercised - power of court to adjourn sale of attached property - Civil Procedure Rules order XXI - Civil Procedure Act (cap 21) section 3A.</i></p>

**Judicial discretion** - exercise of - execution proceedings - discretion to order stay of execution - nature of discretion - how discretion invoked - discretion to adjourn sale of attached property - grant stay of execution *ex parte* - whether judge should instead have exercised discretion to adjourn sale - Civil Procedure Act (cap 21) s 3A - Civil Procedure Rules order XXI rules 7, 18, 25, 32, 35, 60, 61, 61(2), 63, 69.

The appellant sued the respondents for the recovery of the balance due under a loan agreement and obtained judgment in default of appearance. The appellant applied for execution of the decree by attachment and sale of the respondent's moveable property to satisfy the decretal amount, costs and interest. Certain of the respondents' goods were attached, proclaimed and advertised for sale by public auction. The respondents applied *ex parte* during the High Court's long vacation for a stay of execution and liquidation of the decretal amount by instalments. They alleged that the execution application was never served upon them and that they had no notice of it before the attachment was effected. The judge held that they should have been served with the application and granted them the stay. The appellant appealed arguing that the application for stay should not have been granted *ex parte* and asked the court to reverse the ruling and order the respondents to pay the costs of the appeal and of the proceedings in High Court.

**Held:**

1. The court has inherent power *ex debito justitiae* to order a stay of execution pending an appeal. That power can be properly invoked by section 3A of the Civil Procedure Act (cap 21).
2. Where there is no appeal pending but there are circumstances existing that call for the court to exercise that discretion, an order for stay of execution may be granted .
3. Under order XXI rule 63 of the Civil Procedure Rules, the court has discretion to adjourn any sale of attached property to a specified day and hour. In this case, rather than granting the application for stay *ex parte*, the learned judge could have

postponed the sale to a date far enough to give the respondents time to serve the appellant with the application and for an early date to be taken for hearing.

4. The parties to the proceedings are under no duty to give notice at every stage of what step the other is going to take next. If the judgment debtor is aware of the attachment in time, he should tender the decretal sum and pay the brokers' costs for the attachment to be lifted and goods restored to him. If unaware and for good reasons, he may apply for compensation in default of recovery.

5. There is no provision in the Civil Procedure Rules requiring the court to issue a notice to the person against whom execution is applied for requiring him to show cause why the decree should not be executed against him if it is to be by attachment of movable property in or not in his possession unless the application is made more than one year after the date of the decree or against the legal representative of a party to the decree (see Editorial Note, below).

6. The application was rightly brought under section 3A of the Civil Procedure Act (cap 21) but there were no grounds for invoking order XXI rule 25 of the Civil Procedure Rules.

7. (*Obiter* Potter JA) The rules in order XXI would appear to be carefully designed to do justice between the decree-holder and the judgment debtor. There may be occasions when a judge might properly supplement those rules by invoking his inherent powers in order to do justice between the parties. *Appeal allowed.*

**Editorial Note:** Order XXI rule 18(1) of the Civil Procedure Rules (Revised Edition 1998 (1985)), following an amendment by virtue of Legal Notice No 16 of 1984, provides as follows:

"18(1) Where an application for execution is made:

(a) More than a year after the date of the decree; or

	<p>(b) against the legal representative of a party to the decree; or</p> <p>(c) for attachment of salary or allowance of any person under rule 43, the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him ...”</p> <p><b>Cases</b></p> <p>1. <i>Olivia Da Ritta Siqueria E Facho &amp; Another v ER Siqueria, BA Roderigues and RA Ribeiro</i> (1933) 15 KLR 34</p> <p>2. <i>Ujagar Singh v Runda Coffee Estates Ltd</i> [1966] EA 263</p> <p><b>Statutes</b></p> <p>1. High Court (Practice and Procedure) Rules (cap 8 Sub Leg) rules 3, 6</p> <p>2. Civil Procedure Act (cap 21) sections 3A, 38</p> <p>3. Civil Procedure Rules (cap 21 Sub Leg) order XX rule 11(2), order XXI rules 7, 18, 25, 32, 35, 60, 61, 61(2), 63, 69</p> <p><b>Advocates</b></p> <p><i>KM Muli</i> for Appellant</p> <p><i>SM Munikali</i> for Respondents</p>
Court Division:	Civil
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal allowed,
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-

Advocates Against:	-
Sum Awarded:	-
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**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(Coram: Simpson CJ, Potter & Kneller JJA)**

**CIVIL APPEAL NO 70 OF 1982**

**BETWEEN**

**INDUSTRIAL & COMMERCIAL**

**DEVELOPMENT CORPORATION.....APPELLANT**

**AND**

**KEMUMA.....1ST RESPONDENT**

**ONYANDO.....2ND RESPONDENT**

**S OBEGI KABABE.....3RD RESPONDENT**

**J NYAOTA ORIKI .....4TH RESPONDENT**

**JUDGMENT**

The Industrial and Commercial Development Corporation, the appellant, asks this court to reverse a ruling of the High Court (Chesoni J as he then was) of August 19, 1982 and make J Kemuma, Onyando, S Obegi Kababe, J Nyaota Oriki and J Oriki, who trade in Kisii as the "Friends Bakery", the respondents, pay the costs of the appeal and the proceedings in the High Court. The ruling was given in answer to an *ex parte* summons in chambers of August 19, 1982 of the respondents expressed to be brought under rule 3(2) of the High Court (Practice and Procedure) Rules, section 3A and order XXI rule 25 of the Civil Procedure Rules. The respondents asked the High Court judge to hear the application in vacation which was granted under the provision of rule 3(1) of the High Court (Practice and Procedure) Rules. (I think with respect, rule 3(2) is the correct subrule for this). The respondents also asked (at the last moment) for a stay of execution of the decree passed in the suit because the application for execution was not served on them and there was no order for service to be dispensed with. A stay was granted. They asked for leave to apply to the High Court for an order allowing them to liquidate the decretal amount by instalments. They had been negotiating for this indulgence after the attachment but the appellants refused to countenance it. This prayer was not answered.

The costs of the application, the respondents suggested, should be the subject of an order making them costs in the cause but the learned judge rejected this and, instead, ruled that there would be no order as to the costs of the application. The appellant's plaint of May 13, 1980 claimed jointly and severally from the respondents Kshs 131,868.30 with interest at 10% a year from February 1, 1980 until payment in full together with costs and interest at court rates. They were all served with summons to enter appearance to this but none did and judgment in default was entered against them on September 22, 1981 for Kshs 164,835.35 with 10% interest a year on it until payment in full with costs as prayed and a decree reflecting all that issued on April 15, 1982.

The appellant applied on June 15 for execution of the decree by attachment and sale of the respondents' machinery, motor vehicles, stock-in-trade and other attachable property registered in the above company (sic) to satisfy the decretal amount, further costs and interest. A proclamation of July 28, 1982 of the Nyaluoyo auctioneers, court brokers in Kisumu advertised the sale by public auction on August 20, 1982 at 10 am of the respondents' attached goods if the respondents did not pay the broker Kshs 188,098.85 and his charges and costs in the meantime which they did not do. The goods included a Volkswagen, Datsun pick-up, record player, radio cassette, chairs and tables (but no bakery equipment).

There are two more facts to underline. First, the respondents admitted liability and, secondly, they did not challenge the decree which meant that the judge could not order that payment of the amount decreed be postponed or made by instalments without the consent of the appellant which was very far from consenting to any such thing. Order XX rule 11(2). The appellant does not submit that the learned judge was not the vacation judge duly appointed by the Chief Justice at the time under rule 6 of the High Court (Practice and Procedure) Rules or that the respondents could not file their application of August 19, 1982 as an urgent one or that the judge could not deal with it if satisfied that it was urgent under rule 3(2) (ibid). It does complain, however, that the application for a stay should not have been granted *ex parte* and, in my view, this is justified for even if the application were made on August 19 in Nairobi and the auction was to be held on August 20 in Kisumu at 10 am, under order XXI rule 63:

“(1) The court may, in its discretion, adjourn any sale hereunder to a specified day and hour, and the officer conducting any such sale may in his discretion adjourn the sale, recording his reasons for such adjournment; Provided that where the sale is made in, or within the precincts of, the court no such adjournment shall be made without leave of the court.

(2) Where a sale is adjourned under subrule (1) for a longer period than seven days, fresh public notice shall be given, unless the judgment debtor consents to waive it.”

So the sale by auction could have been postponed by the learned judge and the auctioneer told to do so, to a date far enough ahead to give the respondents time to serve the appellant in Nairobi with the papers and for an early hearing date to be fixed for the hearing of the summons. As long ago as November 10, 1933 Lucie-Smith Ag CJ held that the former Supreme Court had inherent power *ex debito justitiae* to order stay of execution pending an appeal in *Olivia Da Ritta Sequeira E Facho & Another v ER Sequeira, BA Roderigues and RA Ribeiro* (1933) 15 KLR 34 (k) and Newbold P Sir Clement de Lestang Ag VP and Spry JA of the Court of Appeal for Eastern Africa in *Ujagar Singh v Runda Coffee Estates Ltd* [1966] EA 263 (CA-K). There was no appeal pending here but it may be that there could be other circumstances calling for the court to exercise that jurisdiction. So the summons of August 19 was rightly brought under section 3A of the Civil Procedure Act (but not Rules as the respondents' advocates carelessly put it). There were no grounds for invoking it in this case. Order XXI rule 25 relates to the court's power to stay execution of a decree in a suit if the decree-holder is a defendant in another pending suit in which the judgment debtor in the concluded one is the plaintiff, which is not so in this one, so order XXI rule 25 was wrongly cited at the head of the summons.

The judgment debtor is to be served by the court and so is the decreeholder with a notice of place and time which the deputy registrar or magistrate will hear them on the terms and conditions of the sale of immovable property that has been attached order XXI rules 60 and 61 unless for reasons to be recorded by him the notice to the judgment-holder may be dispensed with or substituted service thereof be ordered. Order XXI rule 61(2). This does not apply to moveable property. There is, however, no provision in the Rules requiring the court to issue a notice to the person against whom execution is applied for requiring him to show cause on a date to be fixed why the decree should not be executed against him if it is to be by attachment of moveable property in or not in his possession or unless the application is

made more than one year after the date of the decree or against the legal representative of a party to the decree. Order XXI rule 18. The only reason for having a notice of an application for execution of a decree issued for service on the judgment debtor is to give him an opportunity to show cause why execution in that way should not take place. Where the decree is for the payment of money, execution by detention in prison of the judgment debtor, however, may not be ordered unless he has been given this opportunity and then only if the court is satisfied, for reasons to be recorded in writing, one or more of six conditions is or are fulfilled. Section 38 Civil Procedure Act and order XXI rule 32, 35 Civil Procedure Rules. If, however, at the passing of the decree the judgment debtor is within the precincts of the court, the holder of a decree for payment of money may apply orally for immediate execution of it by arrest of the judgment-debtor and the court may grant it. Order XXI rule 7.

The learned judge was of the view that at every stage of a suit each party must have notice of what step the other is going to take next in it, whether or not he has entered appearance, filed a defence or disputes the other's right to do this. He illustrated this with two examples. First, the judgment debtor who did not contest the suit at any stage and finds his vehicle worth Kshs 300,000 attached and sold in satisfaction of a decree for Kshs 2,000. Secondly, the judgment debtor who is away out of Kenya when service of the summons to enter appearance is served on his agent and judgment entered against him but application for execution by attachment and sale is made without notice when he is back in Kenya.

The answer is, I believe, to be found in the fact that if he is aware of the attachment in time and tenders the decretal sum and broker's charges and costs before the sale the attachment will be raised and his movable property restored to him. And if he is not aware of it in time, a sale of movable property, although not vitiated by any irregularity in publishing or conducting it, does not preclude anyone who sustains an injury, by reason of that irregularity at the hand of any other person, instituting a suit against him for compensation, or (if such person is the purchaser) for recovery of the property and for compensation in default of its recovery. Order XXI rule 69. Where the liberty of the citizen is not threatened and the property is movable the Act and Rules do not require the judgment debtor to be given notice to show cause why his moveable property should not be attached and sold in execution of a decree and the reason is because the decree-holder has his judgment and decree and he must satisfy it before the judgment debtor disposes of his movable property. Accordingly, I am of view that this appeal should be allowed with costs for the reasons I have set out.

**Simpson CJ.** I agree that this appeal should be allowed with costs for the reasons given by Kneller JA in his judgment. As Potter JA also agrees it is so ordered.

**Potter JA.** I have had the advantage of reading the judgment herein of Kneller JA. I agree that this appeal should be allowed with costs for the reasons given in that judgment. The rules in order XXI would appear to be carefully designed to do justice as between the decree-holder and the judgment debtor. There may be occasions when a judge might properly supplement those rules by invoking his inherent powers in order to do justice between the parties, but this was not such an occasion.

**Dated and delivered at Nairobi this 17th day of June, 1983.**

**SIMPSON**

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**CJ**

**K.D POTTER**

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**JUDGE OF APPEAL**

**A.A KNELLER**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**



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