

UGANDA / JUDGMENT

Noronha v Siqueira and Others (CA. 13/1931.) [1931] EACA 2 (1 January 1931)

[1931] EACA 2

COURT

East African Court of Appeal

BEFORE

Griffin CJ, Lucie-Smith, J. (Kenya), Thomas, J. (Kenya)

CASE / FILE NUMBER

CA. 13/1931.

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COURT OF APPEAL FOR EASTERN AFRICA.

Before SIR CHARLES GRIFFIN, C. J. (Uganda), THOMAS and LUCIE-SMITH, J. J. (Kenya).

G. H. C. NORONHA (Appellant) (Original Plaintiff)

1. OLIVIA DA RITTA SIQUEIRA.

2. LILIA DA RITTA SIQUEIRA.

MRS. E. R. SIQUEIRA, 3.

(Respondents) (Original Defendants).

C. A. 13/1931.

Civil Procedure Ordinance-section 66-Appeals from decrees and orders section 75 (1) (h), orders from which appeals lie—Appeal as of right from certain orders—O. XL, r.1. O. XIX, r.21—Discretion of Judge in ordering or refusing to order execution.

Held (21-12-31): That the appellant was entitled in the circumstances to apply to the Court of Appeal for leave to appeal. That the trial judge exercised his discretion judicially as he was entitled to do.

Phadke for appellant.

Figgis, K. C., for respondents.

Phadke.—There is nothing on record to show that the property against which execution was asked is trust property. O. XIX r.61 must be interpreted as being mandatory and not merely permissive. He relied on *Crake v. Powell*, 10 L. J. 21, p. 183, *Ishan Chunder Roy v. Ashanoolah Khan*, 10 Cal., p. 817, and *Eyre v. Corporation of Leicester*, 1892, 1 Q. B., p. 136.

Figgis in reply relied on section 274, Indian Civil Procedure Code, and the discretion vested in the Court by section 38 of the Kenya Civil Procedure Code. He submitted that the Judge, knowing that there was a matter before the Court in another suit, was right in exercising his discretion. All that the Court could order was a sale of the contingent right. He relied on *Lewin on Trusts*, 12th Ed., p. 794; 22 Ch. D. 666 at p. 671 *Strickland v. Symons*; 1927 A. C. 732 at p. 817, *Donald Campbell and Co., Ltd. v. Pollak*; *Crowther v. Ellgood*, 34 Ch. D. 691; *Maxwell v. Keun and Others*, 1928 1. K. B.645 at p. 649.

Phadke.—The questions at issue are narrowed down to (1) was there a discretion, (2) was it exercised judicially. The authority of 10 Cal., p. 817 (supra) is still in force—the wording is the same although Mr. Figgis submitted that the relief is different. In effect there has been a refusal of execution. $\square$ *The* $\square$ decision in *Crowther v. Ellgood* (supra) must be construed in favour of his submission.

The judgment of the Court was delivered by Sir Charles. Griffin, C. J., in the following terms:-

JUDGMENT.—This is an appeal from an order of His Honour Mr. Justice Dickinson granting execution by way of attachment. of a plot of land standing in the name of the judgment debtor as registered owner but refusing "for the present" to order sale. The relevant provision under the Civil Procedure Ordinance is Order XIX r.21 which reads as follows: "When the preliminary measures (if any) required by the foregoing rules have been taken, the Court shall, unless it sees cause to the contrary, issue its process for the execution of the decree."

Mr. Phadke has argued strenuously that the learned Judge had no power to refuse to grant the order for sale. His contention was that the words "unless it sees cause to the contrary" did not vest him with discretion for so refusing. He contended that the words "cause to the contrary" must be construed in a very narrow sense, and meant and included only such matters. as execution against the Railway Administration or against the Crown, etc., where attachment and sale were prohibited by specific enactments. He relied upon a decision of the Calcutta High Court, *Ishan Chander Roy v. Ashanoolah Khan*, 10 Calcutta, p. 817, where it was held that the words " unless he sees cause to the contrary " did not imply the existence of discretionary power. This case is referred to in Mulla's Code of Civil Procedure in the note on Order XXI, r.37. The note goes on to say that in a like case under the present Code it was held that the Court had inherent power under section 151 (Kenya Civil Procedure Ordinance, 1924, section 99) to defer the issue or operation of its own process and that it may in a proper case grant time to the judgment debtor. On referring to section 151 and the notes thereon in Mulla, one sees a long list of matters. in respect of which this inherent power has been exercised. They are set forth at page 393 et seq. One of the instances given is an order staying execution, and the case of *Nanda Kishore Singh v.*

Ram Golam Sahu, 40 Calcutta, p. 955, is referred to in the footnotes. In that case an application for leave to appeal to the Privy Council was pending and the judgment debtor-the petitioner-asked for a stay of execution pending the Privy Council decision as to granting or refusing leave. In his judgment granting a stay of execution, Mr. Justice Mookerjee says: "The question therefore arises whether this Court is competent, in the exercise of its inherent power, to stay proceedings under these circumstances. Section 151 of the Code does not lay down.

any new principle, but merely declares that the Court has inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court ... This inherent power is not, as has sometimes been supposed, capriciously or arbitrarily exercised; it is exercised *ex debito justitiae* to do that real and substantial justice for the administration of which alone the Court exists." Mr. Justice Mookerjee goes on to say: "The Court, therefore, ought now to act in aid of a possible order for stay that may hereafter have to be made. If the contrary view is taken, what is the result? Assume that the present application for stay is refused, and the decree-holders permitted to sell the mortgaged properties; the application for special leave is granted by the Judicial Committee and an application then made to this Court by the judgment debtors for stay of proceedings. Are we to say that our action has already been paralysed, that we are powerless to grant relief and that the application is infructuous?"

In the matter now before us it appears that the learned Judge refused to grant an order for sale of the property attached on the grounds that the question was being litigated in another suit in the Supreme Court of Kenya as to whether the attached property was or was not trust property. That suit has been heard and at the present moment is awaiting the pronouncement of judgment by the learned Chief Justice of Kenya. Assume that an order for sale of the property in question were now made, or rather. I think, more accurately, an order for the sale of Mr. Rodrigues' right, title and interest in the property were made, objection proceedings must follow with the object of showing that Mr. Rodrigues was merely a trustee. In these circumstances would any Judge consider it wise and expedient to determine, on objection proceedings, an issue already being litigated in a suit brought for the purpose of determining the question of trust or no trust. In my opinion a Judge in such circumstances, and for the very reasons given by Mr. Justice Mookerjee, would refrain from making an order for sale until the suit had been decided. It appears to me that the considerations set forth in the Calcutta case cited are as applicable to the facts of the present case as to that case. I see no reason for attributing to the words "cause to the contrary" the narrow interpretation sought to be put upon them by Mr. Phadke in his able and interesting argument, which after all is supported by one decision with which a later decision is not in agreement.

In my opinion the learned Judge's discretion was wide enough under Rule 21 to make the order he did make, and I am also of opinion that he properly exercised his judicial discretion in making it.

The respondent will have the costs of the appeal. The order as to costs made in the Court below stands.

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