**Hirji v Alibhai**

**Division:** High Court of Tanzania at Dar Es Salaam

**Date of judgment:** 7 February 1974

**Case Number:** 18/1972 (102/74)

**Before:** Onyiuke J

**Sourced by:** LawAfrica

*[1] Civil Practice and Procedure – Pleading – Amendment – Plaint showing no cause of action –*

*Should not be struck out if amendment showing cause of action can be made – Civil Procedure Code, O.*

7, *r.* 11 (*T*).

*[2] Contract – Court broker – Claim against judgment creditor for charges – Claim in contract not*

*ousted by provision in Rules of Court for collection of charges.*

**Judgment**

**Onyiuke J:** This is an appeal against the decision of the district court of Rungwe district dismissing the appellant’s suit on the ground that it disclosed no cause of action. The appellant was all times material to this case a court broker at Tukuyu. The respondent was a judgment-creditor at whose instance a warrant of attachment of the property of one Yasini Mkakile of Tukuyu was issued by the district court Mbeya in Mbeya Civil Case 320 of 1970. The warrant of attachment was sent to the appellant who accordingly attached a motor vehicle TDM 115 belonging to Yasini Mkakile. The appellant alleged in his plaint that consequent upon the receipt of a letter which was addressed to him by the respondent’s advocates instructing him to tow the said motor vehicle from the judgment-debtor’s house to the police station Tukuyu he incurred expenses in carrying out the instructions. By virtue of the promise the appellant claimed against the respondent Shs. 557/- being charges due to him as Court broker according to the Fees prescribed in the Attachment and Sale (Brokers and Fees Rules) 1964 (hereinafter called the Rules), Shs. 226/- whereof Shs. 200/- was the agreed and/or reasonable charges for towing the said motor vehicle to the police station and Shs. 26/- being damages paid by the appellant to one Francis Noel for damage to his property which occurred while the vehicle was being towed to the police station. When the case came up for hearing in the district court counsel for the respondent raised a preliminary objection to the suit, based on two grounds, to the effect that the suit disclosed no cause of action. The first submission was based on r. 11(2) of the Rules which provides as follows: “The fees, charges and allowances payable under this rule shall be collected by the court and . . . paid to the executing officer”. The second submission was based on r. 5 of the Rules which provides that after making an attachment of movable property the executing officer shall immediately forward to the court which issued the warrant of attachment “an inventory in the form of an itemised list with values, showing the items attached and the value the executing officer places on each item”. It was contended that compliance with this requirement was a condition precedent to the appellant’s cause of action assuming he had one and since the appellant had not complied with this provision he could not maintain the present suit. The magistrate upheld both submissions, holding that the provisions of the rules were mandatory. On the first submission, the magistrate held that by r. 11 (2) it is the court that “shall collect the charges from the decree-holder and pay over to the court broker” and that the rule did not give the court broker the option to collect himself. On the second submission the magistrate held that r. 5 was mandatory, that the court broker shall make an inventory and shall show the estimated value of the attached property and since the appellant had not done so he could not therefore maintain the present action. The appellant has now appealed to this court against this decision. The issues raised by this appeal are whether a court broker can recover by suit the fees or charges prescribed by the Rules in view of the procedure laid down in the Rules for the collection of such charges and whether a court broker can sue for extra work done or services rendered at the request of a decree-holder. In regard to the first issue Mr. Lakha, for the appellant, submitted that a court broker has an independent cause of action and can sue in quasi-contract to recover the charges prescribed by the rules or reasonable charges for services rendered in executing a warrant of attachment. Alternatively, a court broker can sue for breach of a statutory duty. The argument was that r. 11 (1) imposes a duty on the decree-holder to pay the fees; that in breach of his duty the respondent, the decree-holder, procured the execution of the warrant of attachment without paying the fees and that the appellant, the court broker, had sustained damage as a result of the breach of this statutory duty. R. 3 of the Rules defines “executing officer” as a court broker or any other person employed by the Registrar or Magistrate to execute a warrant of attachment or order for sale issued by a court. “Court broker” is defined in the same Rule as an auctioneer appointed under r. 7 of the Rules to be a court broker. “Auctioneer” is defined in Jowitt’s Dictionary of English Law as “a licensed agent appointed to sell property and to conduct sales of auctions”. His remuneration consists of commission on the amount realised by the sale and if no sale has been effected, on the reserve price. A broker is defined in this work as “an agent for the purchase and sale of goods being employed by an intending seller or buyer to find a seller. His commission consists of a commission or payment called brokerage proportionate to the price of goods sold”. Thus it can be seen that the very concept of broker or auctioneer is an agent who renders some service on commission or some remuneration. I do not think that the fact that an auctioneer who is an independent person is appointed a court broker alters the nature of his calling. R. 7 of the rules provides that “the Registrar may with the approval of the Chief Justice appoint any person to be a court broker, if he is satisfied that such person – (*a*) is licensed under the Auctioneers Ordinance to carry on the business of an auctioneer; (*b*) is of good repute and financial standing and (*c*) has adequate facilities for the safe storage of goods”. This is to ensure that a fit and proper person is employed to execute a warrant of attachment. A court broker is however not a paid employee of the court but an independent person who renders service. The remuneration for such service is specified by the Rules in the form of fees or of charges due to him. To digress for a moment, let me compare and contrast the position of a sheriff under the English system. The duties of a sheriff include the charge of parliamentary elections, the summoning of jurors and the execution of process issuing from the High Court and criminal courts. Formerly sheriffs were appointed by the Sovereign from a short list prepared by judges, privy councillors and other high officers of the realm. By the Statute of Westminster the First, C. 26, which Lord Coke said in his Institute was made in affirmation of a fundamental maxim of the Common law “no sheriff nor other the King’s officer is to take any reward to do his office, but shall be paid of that which they take of the King”. (See Phillimore, J. in *Montague v. Davies, Benani & Co*. (1911), 2 K.B. 596 at p. 604). Subsequently the practice grew up of allowing public officers to look to fees as part of their emoluments. As time went on the right of the sheriff to demand certain fees was recognised by Statutes which culminated in the Sheriffs Act 1887 which provides in s. 20(2) that “Any sheriff or officer of a sheriff concerned in the execution of process directed to the sheriff . . . may demand, take and receive such fees and poundage as may from time to time be fixed by the Lord Chancellor . . .” It was decided that “assumpsit” lay by the Sheriff against the judgment creditor for his fees (*Stanton v. Sulliard*, 78 E.R. 893). It was further decided that a bailiff (a person employed by a sheriff to serve writs and make arrests and execution) who executes a writ of fifa can sue the attorney who lodged the writ with the sheriff for the fees due to him under Statute although the attorney gave no directions as to any particular person by whom the writ should have been executed. The fees were legally due to the bailiff and he could sue to recover the fees. *Brewer v. Jones* (1866), 156 E.R. 602. I now return once more to our rules. R. 4 empowers a registrar or a magistrate, where a warrant of attachment or order of sale is issued by the High Court or the court of a resident magistrate or by a district court, to employ such person as he thinks fit to execute the warrant or order provided that where there is a court broker appointed for the area in which the property to be attached or sold is situate, the registrar or magistrate shall employ such court broker to execute the warrant or order unless he is satisfied that there is some sufficient reason for not employing him. This however imposes no obligation on the registrar or magistrate to pay the court broker out of the revenue of the court. R. 8 provides that the registrar or magistrate may require the party applying for attachment or sale to deposit such sum as may be reasonable to meet the fees, charges and allowances payable under the rules. R. 11 (1) provides that the fees, charges and allowances prescribed in the second schedule to the rules shall be payable for the execution of warrants of attachment and orders for sale issued by the High Court, by courts of resident magistrates and district courts and by r. 11(2) “the fees, charges and allowances under this Rule shall be collected by the court and . . . paid to the executing officer.” The position then is that the decree-holder of the party applying for attachment or sale is legally bound to pay the fees and other charges prescribed in the rules and the court broker is legally entitled to those fees and charges on executing the warrant or order. I think the provision relating to the collection of such fees and charges is for the purposes of convenience only and does not destroy the right of the court broker to sue for them in the event of the registrar or magistrate failing to take a deposit from the decree-holder or failing or refusing to collect the fees and charges due to the court broker after he has rendered the appropriate service. I am strengthened in this view by the fact that the rules make provision for collection but make no provision as to how the fees and charges are to be recovered in the event of the decree-holder failing or refusing to pay. I am of the view that the application by a decree-holder for a warrant of attachment imports an obligation to pay the court broker or any other person employed by the registrar or a magistrate to execute the warrant the fees and charges prescribed by the rules for which an action lay in the event of failure or refusal by the registrar or magistrate to take a deposit or collect them. I am dealing with the existence of a cause of action and I am not concerned here with any defence to that action which a decree holder may have e.g. that he has made a deposit to cover the fees and charges or that he has paid them into court. I will allow the appeal in respect of that part of the magistrate’s ruling based on the first ground of the preliminary objection. I proceed to the second ground on which the suit was dismissed as disclosing no cause of action. O. 7 r. 11 of the Civil Procedure Code 1966 provides as follows: Rule 11: “The plaint shall be rejected in the following cases: (*a*) where it does not disclose a cause of action; (*b*) where the relief claimed is undervalued and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed, fails to do so; (*c*) where the suit appears from the statement in the plaint to be barred by any law. Provided that where a plaint does not disclose a cause of action or where the suit appears from the statement in plaint to be barred by any law and the court is satisfied that if the plaintiff is permitted to amend the plaint, the plaint will disclose a cause of action or as the case may be, the suit will cease to appear from the plaint to be barred by any law, the court may allow the plaintiff to amend the plaint subject to such conditions as to costs or otherwise as the court may deem fit to impose.” Dealing with the second ground of objection raised by the respondent the magistrate stated as follows: “Secondly r. 5 states that the court broker shall make an inventory and show the estimated value of the attached property. The plaintiff did not do so and the fees or charges due to him are assessed on the estimated value of the attached property. The plaintiff has denied himself the opportunity to assess his charges or fees. His counsel has said that the fees or charges can be assessed on the claim shown in the attachment order. I do not think that this theory is supported by law for the second schedule bases the assessment on the value of the attached property and not on the value of the claim shown in the attachment order.” Apparently the appellant’s counsel in the court below took the view that since only one item was attached, namely, the motor vehicle, and the vehicle, and the value thereof was far in excess of the decretal amount there was no need to comply with r. 5 of the rules. I think he was in error and the magistrate was right in holding that the fees or charges must be based, in the words of r. 5, on “the estimated value of the property which the executing officer places on such item”. I can however see no unsurmountable difficulty in the appellant placing an estimated value on the motor vehicle. I should think that this is a case where the magistrate can exercise his discretion to allow the plaintiff to amend his plaint so that it can disclose a cause of action in view of my earlier decision that the appellant can recover his fees and charges by suit. I will deal finally with the last issue raised in this appeal. A court broker after attaching movable property may keep possession of it in any place he deems safe. In this case the respondent through his advocate instructed the appellant to tow the vehicle and leave it in the police station Mbeya. The appellant was not bound to do so. It was in the nature of service rendered by the appellant at the respondent’s request beyond the usual services contemplated by the Rules for which the appellant is entitled to sue on a “quantum meruit” – a reasonable amount will depend on the circumstances of each case. I think however that the magistrate erred in law in dismissing this item of the appellant’s claim without going into its merits. In the final result I will allow this appeal with costs and will remit the case to the District Court for hearing in the light of the principles enunciated in this judgment. *Order accordingly.*

For the appellant:

*MA Lakha* (instructed by *Lakha & Co*, Dar es Salaam