



**Buscar (EA) Limited v Shali & 2 others (Civil Appeal
22 of 2020) [2022] KECA 776 (KLR) (10 June 2022) (Judgment)**

Neutral citation: [2022] KECA 776 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 22 OF 2020
SG KAIRU, A MBOGHOLI-MSAGHA & P NYAMWEYA, JJA
JUNE 10, 2022**

BETWEEN

BUSCAR (EA) LIMITED APPELLANT

AND

ISSA SHEKUE SHALI 1ST RESPONDENT

BUSCAR LIMITED 2ND RESPONDENT

STANBIC BANK LIMITED 3RD RESPONDENT

*(An Appeal arising from the ruling by the Employment & Labour
Relations Court at Mombasa (L. Ndolo, J) on 4th March 2020 in
Mombasa Employment & Labour Relations Court case No. 323 of 2015)*

JUDGMENT

1. This appeal arises from a ruling dated 4th March 2020 by the Employment and Labour Relations Court (ELRC) at Mombasa (Ndolo J.) in Mombasa ELRC Case No 322 of 2015. We had to struggle to find the said ruling in the Record of Appeal, as it was not included in the index thereof, and finally located it in an uncertified handwritten three-page photocopy of the trial Court's proceedings of 4th March 2020, which were randomly placed in the said Record at pages 366-368 thereof.
2. The gist of the said ruling, which was on a garnishee application dated 19th December 2019 brought by Issa Shekue Shali, the 1st Respondent herein, was that that the relationship between Buscar Limited (the 2nd Respondent) and Buscar (EA) Limited (the Appellant) was settled in the judgment delivered in the matter on 22nd November 2018 by Rika J. Further, that attempts to reopen the issue were declined in subsequent rulings by Rika J. and Ndolo J. dated 24th October 2019 and 11th December 2019 respectively. The learned Judge concluded that the effect was that the Appellant and 2nd Respondent was one and the same person for purposes of the garnishee proceedings, and granted an order absolute



directing the garnishee to release the sum of Kshs 498,483.61 held in account Number xxxx domiciled in Stanbic Bank, Kenyatta Avenue in Nairobi, in satisfaction of the decree issued by the trial Court on 22nd November 2018.

3. In the application of 19th December 2019, the 1st Respondent herein, who was the Claimant in the suit in trial Court, sought an Order Nisi and Order Absolute against the garnishee, which was Stanbic Bank (the 3rd Respondent herein), in relation to the said account, after judgment was entered in his favour on 22nd November 2018 arising out of wrongful termination of employment.
4. The Appellant was an Objector in the said proceedings, and had filed an Objection to Attachment dated 6th September 2019 and two applications, the first dated 6th September 2019 seeking stay of execution of the judgment delivered on 22nd November 2018, a finding that the attached movable properties belonged to the Objector, and stoppage of the attachment. The said application was dismissed in a ruling delivered by Rika J. on 24th October 2019, after taking oral submissions from the parties. The learned Judge in his ruling found that the objection was based on a claim that the Objector was a different company from the 2nd Respondent, and that this issue had been dealt with by the trial Court in its judgment. It is again notable that we have had to rely on uncertified photocopies of handwritten proceedings in this regard.
5. The second application dated 25th October 2019 also sought a stay of the attachment and a temporary injunction, and was the subject of the ruling by Ndolo J. dated 11th December 2019. The learned Judge in dismissing the application, noted that the same was an abuse of the process of court as it was seeking orders similar to the one sought in the earlier application, and was based on the same grounds, even though described by the Appellant as an application for stay of execution pending appeal. It appears from the said application that the Appellant had also filed a Notice of Appeal against the ruling of Rika J. of 24th October 2019, and the fate of the said appeal is not known.
6. The 1st Respondent's garnishee application of 19th December 2019 was then subsequently filed, an Order nisi granted ex parte on 27th January 2020 and the application subsequently heard, leading to the impugned ruling of 4th March 2020. The Appellant has now challenged the two-page handwritten ruling delivered on 4th March 2020 by raising fourteen grounds of appeal in its Memorandum of Appeal dated 9th March 2020. After seeking to set aside the impugned ruling and unconditional lifting of the Garnishee Order Absolute, the Appellant also prays that "a declaration do issue to the effect that the Appellant and 2nd Respondent are two distinct legal entities" in its Memorandum of Appeal.
7. During the hearing of the appeal held on 9th March 2022, we directed Mr. Ngonze, the learned counsel for the Appellant, to make oral submissions, after he failed to comply with directions to file and serve his written submissions. Learned counsel for the 1st Respondent, Mr. Nyanje, and learned counsel for the 3rd Respondent, Mr. Wafula, were also present at the hearing, and highlighted their written submissions, which they had filed after waiting in vain for the Appellant's submissions. The 2nd Respondent was not represented at the hearing, although served with the hearing notice, and had also not filed any submissions.
8. Mr. Ngonze collapsed his grounds of appeal into one ground during the hearing, namely that the trial Court failed to appreciate the legal distinction between the Appellant and 2nd Respondent, and detailed the history of the proceedings in his submissions to illustrate that the Appellant was not a party to the initial proceedings and that the 2nd Respondent was dissolved by a Gazette Notice on 26th June 2006. However, that despite these circumstances, the garnishee orders were made against an account that belonged to the Appellant.



9. Mr. Nyanje on his part submitted that the question of the separate legal entity between the Appellant and 2nd Respondent was conclusively determined in the judgment delivered on 22nd November 2018 and no appeal has been filed against the said judgment. In addition, that the order absolute was satisfied by the garnishee and money paid to the 1st Respondent, and the appeal is therefore moot. This position was confirmed by Mr. Wafula, who submitted that the funds were released to the 1st Respondent by the 3rd Respondent after the ruling by the trial Court of 4th March 2020 confirmed that the issue of the legal status of the Appellant and 2nd Respondent had been dealt with in the judgment, and that the appeal against it is therefore untenable.
10. In reply, Mr. Ngonze contended that since the Appellant was not a party to the suit in the trial Court it could not appeal the judgment, and that the appeal is not an academic exercise, as the Appellant needs a determination made that it is a distinct entity from the 2nd Respondent, to enable it pursue the refund of the monies paid to the 1st Respondent.
11. We will start our determination by pointing out that the [Court of Appeal Rules of 2010](#) in Rule 75 (1) provides that any person who desires to appeal to the Court of Appeal should file a Notice of Appeal, and provides the timelines and procedures of filing the said Notices and Record of Appeal. Therefore, contrary to the Appellant's counsel's submissions, they were not shut out from the Court of Appeal and the seat of justice by virtue of not being a party to the suit in the trial Court, and could and ought, as an affected person, to have filed an appeal against the findings of the trial Court in the judgment delivered on 22nd November 2018.
12. We have also perused the said judgment, and note that indeed the issue of the legal entity of the Appellant and 2nd Respondent was urged and ruled on by the trial Judge as follows:

“It is not material to the Claim, whether the Respondent/Employer was Buscar Limited, Buscar E.A. Limited or Busways Limited. The Claimant has shown he was employed by the Respondent Transport Business, first as a Booking Officer and later as the Manager at Kilifi Office. The business and legal structure adopted by the Employer, which is frequently aimed at avoiding legal and regulatory burdens, should never be the concern of the Employee. It is sufficient that the Employee is able to show he worked for the Employer's business, regardless of whichever form that business adopts. The Claimant was never involved in registration of his Employer's business, and is not expected to know details or registration. Employees do not go about asking Employers, upon employment, what their Employers' business registration details and operational structures are. Section 2 of the [Employment Act](#) 2007 is broad enough to include the different reincarnations of the business that is Buscar. It would even have been permissible for the Claimant, to sue the businessman named Salim Sheikhan Salim, who called and told the Claimant not to report to work, on 19th December 2014. “
13. Having not been appealed against, the learned Judge therefore did not err in her observations and findings in the impugned ruling that the issue of the distinct legal characters of the Appellant and 2nd Respondent was res judicata. As this was the only ground raised by the Appellant both in the garnishee application appealed from and in this appeal, we find no merit in this appeal. We are for the same reason not in a position to issue any declaration as to the legal character of the Appellant and 2nd Respondent, quite apart from the fact that this particular relief was not a substantive prayer, nor urged in the garnishee proceedings appealed from.



14. Lastly, as can be deduced from our observations above, we find it necessary to point out that we are perturbed by the inept preparation of the record of appeal, which, with respect, is unfortunate.
15. The appeal is accordingly dismissed with costs to the 1st and 3rd Respondents.
16. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 10TH DAY OF JUNE, 2022.

S. GATEMBU KAIRU (FCI Arb)

.....

JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

