



Slingshot Limited & another v Nyamai & another (Employment and Labour Relations Appeal E120 of 2024) [2024] KEELRC 2297 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEELRC 2297 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
EMPLOYMENT AND LABOUR RELATIONS APPEAL E120 OF 2024**

**M MBARŪ, J
SEPTEMBER 26, 2024**

BETWEEN

SLINGSHOT LIMITED 1ST APPELLANT

CATAPULT LIMITED 2ND APPELLANT

AND

CHARLES MUNYAO NYAMAI 1ST RESPONDENT

**DOMINIC ANAYA T/A ANAYA & COMPANY ADVOCATES 2ND
RESPONDENT**

*(Being an appeal from the ruling delivered by Hon. G Sogomo
on 17 May 2024 in Mombasa CMELRC No.E178 of 2018)*

JUDGMENT

1. The appeal herein arises from the ruling delivered on 17 May 2024 in Mombasa CMELRC No.E178 of 2018. The appellants are seeking that the ruling be set aside the execution against the appellants by the 2nd respondent be stayed with costs of these proceedings and the trial court proceedings be met by the respondents.
2. The background to this appeal is an application filed by the 1st respondent, Charles Munyao Nyamai acting in person, dated 19 March 2024 seeking orders that the trial court review its directors and proceedings of 19 March 2024 allowing the 1st respondent (the Claimant) advocates' garnishee application. He also applied to act in person through an application dated 16 February 2024.
3. In response, the advocates for the 1st respondent contested the application and filed a Notice of Preliminary Objections dated 25 March 2024 seeking to have the application struck out for offending the provision of Order 9 rules 9 and 10 of the Civil Procedure Rules.



4. The Notice of Preliminary Objections was given priority. The learned magistrate analyzed the submissions and held that the objections were with merit and the application dated 25 March 2024 where the 1st respondent was seeking to act in person through an application dated 16 February 2024 and the application dated 19 March 2024 was struck out with costs to the advocate.
5. Aggrieved by this ruling and orders, the appellants filed this appeal on five (5) grounds;
 1. That the learned magistrate erred in law and fact by failing to take into account the admission by the 1st respondent and the submissions by the appellants that the appellant had paid the respondents the entire consent sum.
 2. In upholding the 2nd respondent's Preliminary Objection dated 25th March 2024, the learned magistrate erred in law by failing to take into account the fact that the claimant had already been paid the balance of the consent sum.
 3. The learned magistrate erred in fact in law by relying upon technicalities in respect of the interpretations of the applicability and intent of the provisions of Order 9 rule 9 of the Civil Procedure Rules and in so doing exposing the appellants to the risk of making double payments arising from the same consent and matter.
 4. The learned magistrate erred in fact and law by failing to appreciate that the appellants were not in default in respect of settling the consent sum.
 5. The learned magistrate erred in law and fact by relying solely on the evidence of the 2nd respondent despite the said 2nd respondent not disputing that the balance of the consent award was already paid to the 1st respondent.
6. Parties attended and addressed the appeal by way of written submissions.
7. The appellants submitted that the proceedings before the Trial Court and the admission by the 2nd Respondent who filed a Preliminary Objection in person against an Application by the 1st Respondent were in error. There existed an Advocate-Client relationship between the Parties who based on the proceedings fell out leading to the parties filing independent pleadings at the point of execution.
8. For good order, the appellants needed to sue the two respondents who had fallen out which is hinged on the 2nd Respondent having received a sum of the Consent award from the Appellants and the 2nd Respondent thereafter having received the balance directly from the Appellants who were his former employer. That despite the payments having been made, the 2nd Respondent instituted Garnishee proceedings against the Appellants seeking to collect the balance of the Consent award which his client (the 1st Respondent) admits he received from the Appellants.
9. The appellants submitted that the conduct of the 2nd Respondent made it necessary to have the 2 Parties participate in the instant Appeal just as they participated in the prosecution of the Application that led to the delivery of the impugned Ruling.
10. The 2nd Respondent's Preliminary Objection is an admission that there were proceedings between the 1st Respondent and the 2nd Respondent and the 2nd Respondent is therefore estopped from denying liability. The appellants are seeking that the ruling delivered on 17 May 2024 be set aside effectively having a direct effect on the Garnishee Orders of 19th March 2024 as the same will be rendered unnecessary under the payments having already been made, which should be determined.
11. The appellants submitted that they were parties to the prosecution of the Application leading to the impugned Ruling and participated in the same and that they were dissatisfied by the same and stand to



- suffer loss. The 2nd Respondent is not executing as against his client but as against the Appellants who paid the entire Consent amount to both the 1st Respondent and to the 2nd Respondent. To allow the 2nd Respondent to proceed with the execution as against the Appellants will mean that the Appellants will be condemned to settle the same Consent award twice.
12. The differences between the respondents should not cause prejudice to the Appellants. The 2nd Respondent having received the sum of Kshs. 150,000.00 and the 1st Respondent has collected the balance in the sum of Kshs. 153,000.00 from the Appellants, no further execution should proceed as against the Appellants in respect of the proceedings before the Honourable Trial Court in the event the 2nd Respondent proceeds with the Garnishee Application and the execution thereof, the subject matter of the Appeal which is aimed to setting aside the said execution shall be negated. The appellants are seeking that the court do safeguard the subject matter of an Appeal so as not to render the Appeal nugatory.
 13. The appellants submitted that the Preliminary Objection does not meet the threshold in respect of a Preliminary Objection as it is not possible to determine the same without devolving into factual issues in respect of whether payment was made and securitizing the relationship between the Respondents. There is a disagreement in respect of the respondents which calls upon the court to venture into the proceedings before the trial court and the ruling should be set aside to avoid a double payment of the respondents.
 14. The respondents submitted that there is improper joinder of the 2nd respondent in these proceedings who is sued in his capacity despite acting for the 1st respondent. In the case of [*Attorney General V Bala Civil Appeal 223 of 2017*](#), the court held that a party who is aggrieved by the judgment must seek leave of the court to appeal. Rule 2 of the Employment and Labour Relations Court (Procedure) Rules defines parties and a respondent to be the person against whom a suit has been instituted in the court or who replies to any proceedings in court.
 15. The appellants are aware that the suit before the court is filed by the 1st respondent and not the 2nd respondent. Proceedings before the lower court do not involve the 2nd respondent to justify the joinder herein. In the case of *JMK v MWM & Another [2015] eKLR*, the court held that under Article 50 of [*the Constitution*](#), the right to a hearing is protected and the hearing should not be through ambush of any party.
 16. The ruling delivered on 17 May 2024 related to a Notice of Preliminary Objection involving the respondents herein with regard to the application of Order 9 Rule 9 of the Civil Procedure Rules. In the case of *Attorney General v Bala*, the court held that a litigant has the right to institute any suit of a civil nature in court. There is no right of appeal unless leave is granted. In this case, there is no locus standi to join the 2nd respondent in these proceedings.

Determination

17. The ruling delivered on 17 May 2024 allowed the Notice of Preliminary Objections dated 25 March 2024 and Struck out the Notice of Motion dated 19 March 2024.
18. The objections related to the application of Order 9 rules 9 and 10 of the Civil Procedure Rules and the learned magistrate well considered that under these provisions, where there is a change of advocate after judgment has been issued, such change or intention to act in person must be effected by consent or through an order of the court.



- 19. In this case, the 1st respondent opted to act in person post-judgment without consent from his advocate of the order of the court. Hence, the learned magistrate allowed the objections to act in person as this was found to be contrary to Order 9 Rule 9 of the Civil Procedure Rules.
- 20. The effect of these findings implicated the application filed by the 1st respondent dated 19 March 2024. Having failed to obtain consent or an order of the court to act in persons post-judgment, the 1st respondent could not file his application as done.
- 21. This application was struck out. It does not exist.
- 22. The 1st respondent was effectively given another chance by the trial court to move and correct the error and disregard Order 9 rules 9 and 10 of the Civil Procedure Rules.
- 23. Did the learned magistrate fail to consider the fact that the appellants had fully settled the claim by consent? To fully appreciate the issues at hand and address them fully, the motions of Order 9 rule 9 of the Civil Procedure rules must be gone into first to allow the trial court to address the issue(s) of full settlement of the consent sum. To remove either respondent would deny the trial court the full perspective of how much has been paid or whether there is a full settlement.
- 24. The fact of payment to the 2nd Respondent the sum of Kshs. 150,000.00 and the 1st Respondent has collected the balance in the sum of Kshs. 153,000.00 is not denied. To remove either respondent from these proceedings and allow further Garnishee proceedings would deny the trial court material records to support these payments. To allow this full view and perspective, where the 1st respondent seeks to act in person, he must do so within the law and where there is no cooperation from the 2nd respondent who is herein enjoined to address the payments so far remitted by the appellants, Order 9 of the Civil Procedure Rules has the procedural requirements to be addressed and obtain an order of the court to act in person.
- 25. The appellants should not be left exposed while the respondents are allowed to address the provisions of Order 9 rules 9 and 10. The Garnishee Order of 11 September 2023 is hereby set aside and where the sum of Ksh.153, 000 thereof is released to the 1st respondent as the intended beneficiary, he shall secure the same with a deposit in court within the next seven (7) days. Where there is no deposit, the appellants shall be discharged from making this payment to any of the respondents.
- 26. The appeal addressed as above, parties revert to the trial court, save, the Garnishee Order is hereby set aside and where there is payment of the sum of Ksh.153,000 the same to be deposited in court within 7 days failure to which the appellants will be discharged from making such payment.

Mention before the trial court for directions.

Costs of the appeal are to be met by the 1st respondent.

DELIVERED IN OPEN COURT AT MOMBASA THIS 26 DAY OF SEPTEMBER 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

