



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 323 OF 2015

ISSA SHEKUE SHALL.....CLAIMANT

VS

BUSCAR LIMITED.....RESPONDENT

AND

BUSCAR E.A. LIMITED.....OBJECTOR/APPLICANT

RULING

1. This ruling flows from the Objector's application dated 25th October 2019 seeking the following orders:

- a) Unconditional stay of execution of the attachment commenced vide Proclamation of Attachment dated 3rd September 2019 in respect of the Objector's assets listed therein as well as any/all process and/or orders consequential thereto;
- b) An order of temporary injunction restraining the Claimant whether by himself, his agents, servants, employees, assigns or anyone howsoever claiming through him from levying execution, attachment, sequestration and/or distress against any assets of the Objector and/or in any manner whatsoever, interfering with the Objector's open, peaceful, quiet, lawful, continuous, exclusive and uninterrupted possession, occupation, enjoyment and/or derivative use of any of its assets;
- c) That the said orders be served upon the OCS, Central Police Station Mombasa for purposes of ensuring execution thereof, provide security and ensure no public disturbance ensues, whilst maintaining law and order throughout and after execution of this order;
- d) That the orders above do persist until the hearing and determination of the appeal subject hereof;
- e) That the costs of the application be provided for.

2. The application, which is supported by the affidavit of Ali Mohamed Abubakar is premised on the following grounds:

- a) That the Objector herein is a company duly incorporated under the Companies Act, 2015 with its registered office in Kenya;
- b) That the Claimant instructed M/S Makuri Auctioneers to proceed with proclamation of properties belonging to the Objector;
- c) That the listed properties subject of the said proclamation solely belong to M/S Buscar E.A. Limited, the Objector herein who has equitable and/or legal interest over the said properties;
- d) That upon inquiry, the Objector was informed that the attachment by the aforesaid Auctioneers was pursuant to a Decree issued by this Court on 22nd November 2018;
- e) That a further scrutiny of the said Decree and Warrants of Attachment presented to the Objector reveal that they were issued as against M/S Buscar Limited, not M/S Buscar E.A. Limited;
- f) That the attached properties belong to the Objector, Buscar E.A. Limited, not Buscar Limited;
- g) That the Objector was never enjoined as a party in the court proceedings;

- h) That there is not now, nor has there ever been any relation whatsoever between the constitution, directorship, management, affairs, assets and liabilities of M/S Buscar Limited and M/S Buscar E.A. Limited;
- i) That this matter proceeded for hearing without the knowledge and participation of the Objector, a distinct entity from the named Respondent;
- j) That it was incumbent upon the Claimant's Advocates to have served the Objector in person upon gaining knowledge that the Objector is the owner of the proclaimed properties yet was not a party to the court proceedings;
- k) That the Objector having not been a party to this suit, and there being no judgment against the Objector, the Objector cannot be called upon to make good the judgment on record;
- l) That the Objector had a right to a fair hearing hence ought to be given a chance to defend itself;
- m) That the issues raised by the Objector herein are meritorious and triable;
- n) That failure to defend the suit was not intentional but due to the stated reasons;
- o) That vide Notice of Motion dated 6th September 2019, the Objector sought *inter alia*;
- i) That there be a stay of execution of the Judgment/Decree of the Court given on 22nd November 2018, with specific reference to its execution in respect of the Objector's movable properties as listed on the Proclamation Notice dated 3rd September 2019;
- ii) That the Court be pleased to make a finding that the attached movable properties namely; 8 seats ((3-seater), reception chairs valued at Kshs. 3,000, TV set valued at 10,000, 1 complete computer set valued at 5,000, Motor Vehicle (Bus) Reg. No. KCB 596K, to be valued solely and absolutely belong to the Objector and/or that the Objector has an equitable interest over the said movable properties;
- iii) That the Court be pleased to stop the intended attachment to be levied on the above named properties namely; 8 seats ((3-seater), reception chairs valued at Kshs. 3,000, TV set valued at 10,000, 1 complete computer set valued at 5,000, Motor Vehicle (Bus) Reg. No. KCB 596K, to be valued as listed by M/S Makuri Auctioneers on 2nd September 2019.
- p) That the said application was eventually set down for hearing on 24th October 2019 when:
- i) The Court unprocedurally expunged the Objector's skeletal submissions from the court record lodged on 23rd October 2019;
- ii) The Court unprocedurally declined the Objector's application for leave to appeal from the said decision;
- iii) The Court took oral submissions from the parties, and immediately thereafter rendered a ruling summarily dismissing the Objector's said application;
- iv) The Court thereafter proceeded to grant leave to the Objector to appeal against the said decision, but declined to grant interlocutory stay of execution pending formal application on appeal.
- q) That in the said ruling, the Court held *inter alia*, that:
- i) The Objector and the Respondent, although listed as separate legal entities, were one and the same;
- ii) The properties attached vide the aforesaid Proclamation of Attachment of moveable property, although owned by the Objector, also belong to the Respondent.
- r) That the said decision is wholly erroneous for, *inter alia*, misapprehending the concept of 'separate legal entity' as enshrined in Company Law;
- s) That being aggrieved by the said decision in its entirety, the Objector has lodged a Notice of Appeal;
- t) That a cursory glance at the draft Memorandum of Appeal reveals that the Objector's intended appeal:
- i) Is wholly arguable and portends overwhelming chances of success;
- ii) Shall be rendered nugatory should stay of execution not be granted, as sale of the Objector's assets is imminent.
- u) That summarily:
- i) The Objector is not the Respondent/Judgment Debtor herein;

ii) The Objector has never been a party to the proceedings before the Court;

iii) The attached moveable properties i.e. 8 seats (3-seater), reception chairs valued at Kshs. 3,000, TV set valued at 10,000, 1 complete computer set valued at 5,000, Motor Vehicle (Bus) Reg. No. KCB 596K, to be valued belong to the Objector solely and absolutely;

iv) The averments at paragraphs 1-17 of the affidavit in support of the Objector's dismissed application have neither been controverted nor challenged in any way, manner or form, and the Claimant has not controverted the incontrovertible facts that:

- The Objector has inalienable equitable interest in the attached property;

- The Objector did not participate in the trial before the Court.

v) That it is in the interest of justice, fairness and equity that the Objector's application be allowed as prayed;

vi) That unless the Court grants the orders sought, the attachment will proceed to the Objector's detriment.

3. The Claimant's response to the Objector's application is contained in his replying affidavit sworn on 4th November 2019. He accuses the Respondent and the Objector of delaying him from enjoying the fruits of his judgment against which no appeal has been preferred.

4. The Claimant states that what the current application seeks to do is to stay execution of the Decree dated 2nd December 2018, while no appeal has been preferred against it.

5. The Claimant further states that there was a previous application for stay of execution dated 2nd December 2018 brought under Order 42 Rule 6, which application was argued and dismissed by the Court on 31st July 2019.

6. The Claimant therefore maintains that in so far as the instant application seeks stay of execution of the attachment, emanating from the Warrants issued pursuant to the Decree herein, the application offends the principle of *res judicata*.

7. The Claimant goes on to state that the Objector filed objection proceedings and was granted a stay of execution on 12th September 2019, which orders were vacated when the objection application was dismissed after an elaborate ruling delivered on 24th October 2019.

8. The Claimant adds that by virtue of the fact that the order apparently appealed from is a dismissal order, no stay of execution orders can be granted against such an order.

9. In response to the question whether the intended appeal has merit, the Claimant states that the issue of whether the Judgment and Decree herein bind Buscar E.A. Limited was determined in the suit and captured in the Judgment and cannot now form the basis of an appeal. The Claimant concludes that the appeal has no merit.

10. When Counsel for the Objector appeared in court on 5th December 2019, he submitted that in the current application, the Objector seeks stay of execution pending appeal against the ruling delivered by my brother, **Rika J** on 24th October 2019.

11. In that ruling, which was rendered *ex tempore*, my brother Judge dismissed the objection filed by the Objector with costs to the Claimant. I have looked at the application giving rise to the ruling of 24th October 2019 and I am struck by the similarity between the prayers and grounds in that application and those in the application now before me.

12. It seems to me that what the Objector is seeking to do is to have a second go at the prayers sought before my brother Judge. That can only be mildly described as an abuse of the court process.

13. Additionally, as submitted by Counsel for the Claimant, the order of 24th October 2019 being a dismissal is not a positive order which can be stayed. That would explain why in the current application, the Objector says that it is seeking stay of execution pending appeal but relies on the grounds raised at the initial objection proceedings which formed the subject matter of the ruling by my brother Judge.

14. For the foregoing reasons, the Objector's application dated 25th October 2019 is disallowed with costs to the Claimant.

15. It is so ordered.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 11TH DAY OF DECEMBER 2019

LINNET NDOLO

JUDGE

Appearance:

Miss Sidinyu for the Claimant

Mr. Ngonze for the Objector

No appearance for the Respondent