



**Chogo v Kamongo Waste Paper Kenya Limited (Employment and Labour Relations  
Petition E103 of 2023) [2025] KEELRC 1186 (KLR) (28 April 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1186 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS PETITION E103 OF 2023**

**HS WASILWA, J**

**APRIL 28, 2025**

**BETWEEN**

**JOHNSTONE MAGILI CHOGO ..... PETITIONER**

**AND**

**KAMONGO WASTE PAPER KENYA LIMITED ..... RESPONDENT**

**RULING**

1. The Applicant filed a Notice of Motion dated 16<sup>th</sup> January 2025 seeking orders that: -
  1. Spent
  2. pending the hearing and determination of this application inter parties, this Honourable Court be pleased to grant a stay of execution of the judgment delivered herein on 11<sup>th</sup> October 2024 and the consequential decree, and more specifically the intended attachment and sale of the Respondent's motor vehicles as proclaimed by Bemac Auctioneers on 14<sup>th</sup> January 2025.
  3. The Honourable Court be pleased to grant the Respondent an opportunity to negotiate a payment plan with the Respondent in settlement of the total decretal sum (inclusive of taxed costs) once duly determined.
  4. The costs of this Application be provided for.
  5. The Honourable Court be pleased to grant such further or other orders as it may deem just and expedient in the circumstances of this case.
2. The Application was brought pursuant to Article 48 and 50(1) of *the Constitution* of Kenya, Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016, Order 21, Rule 12, Order 22 Rule 22 and Order 51 of the Civil Procedure Rules and all other enabling provisions of law.



### **Applicant/Respondent's Case**

3. The Applicant avers that this Court vide its judgment delivered on 11<sup>th</sup> October 2024, ordered it to pay the Petitioner Kshs. 932,349 being one month's salary in lieu of notice and compensation for unlawful termination.
4. The Applicants avers that pursuant to this judgment, the Petitioner moved to proclaim the Respondent's property vide a proclamation notice served through Bemac Auctioneers dated 14<sup>th</sup> January 2025 expiring on 20<sup>th</sup> January 2025. The Applicant is apprehensive that the auctioneers will attach its motor vehicles listed in the notice therein to its detriment.
5. The Applicant avers that it is facing financial hardships occasioned by the aftermath of covid 19 pandemic which led to an economic downturn and it is actively implementing strategies to return to full operation: the attached motor vehicles are essential tools of its business operations and their attachment will occasion irreparable harm to its business which may result to cessation of its operations.
6. It is the Applicant's case that it has made proposals to the Petitioner's advocates to satisfy the judgment award in 6 equal monthly instalments and thus seeks for an opportunity to engage in good faith and negotiate a payment plan.
7. The Applicant avers that it seeks for stay orders to negotiate a payment plan and that the same is in the interest of fairness and the administration of justice.

### **Petitioner/Respondent Case**

8. In response to the Application, the Petitioner/Applicant filed grounds of opposition dated 24<sup>th</sup> January 2025 on grounds that:
  1. The Applicant cannot benefit from the orders sought which are discretionary on the ground that they are in defiance of the court orders in satisfaction of the decree which they are evading through this application by alleging that they are in negotiation of an out of court settlement of the decretal sum and the delay of the negotiation is not explained since judgment was issued.
  2. The Application is an abuse of the process of the honourable court in so far as the Applicants are running away from paying the decretal sum.
  3. The Petitioner/Respondent is suffering after unlawful dismissal and the Applicant herein should be ordered to pay the whole decretal sum, interest, cost and auctioneers charges in full to enable the Petitioner/Respondent to enjoy the fruits of his judgment.
  4. If the Honourable Court will be inclined to grant the order of stay of execution of the decree which is opposed, then pursuant to prayer no.2 of the application, the Petitioner/Respondent shall seek that the whole decretal sum, interest, cost and auctioneers' charges amounting to Kshs. 1,552,346 be deposited within 21 days of the order being made in an interest earning bank account to be opened in the joint names of the Petitioner/Respondent's and Applicant's counsels or the decretal sum be deposited in this Court.
  5. The Application remains bad in law, misconceived, frivolous and devoid of any merit and ought to be struck out.



## Applicant's Submissions

9. The Applicant submitted on two issues: whether the Applicant can settle the decretal sum in 6 installments; and whether the Respondent can proceed to tax a bill of cost post execution.
10. On the first issue, the Applicant relied on the case of *RWW v EKW* [2019] KEHC 6523 (KLR) where the Court stated:-

“

“ 10. I have proceeded to determine whether the conditions stipulated for grant of stay have been met. On whether the appellant will suffer substantial loss, I am reminded of the sentiments of Gikonyo J in *James Wangalwa & another v Agnes Naliaka Cheseto* Misc Application No 42 of 2011 [2012] eKLR.

No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein Vs .Chesoni* [2002] 1KLR 867, and also in the case of *Mukuma Vs. Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

11. In view of the foregoing, the Applicant submitted that the immediate attachment of its business assets will lead to its complete shutdown and inability to generate revenue to settle the decretal sum going against the principles of proportionality in execution. Further, it has proposed a reasonable and structured 6 instalment plan to settle the decretal sum in line with the principles of fairness.
12. It is the Applicant's submission that the Court ought to consider its proposal and exercise discretion in favour of reasonable and structured payment instead of a prejudicial forced execution.
13. On the second issue, the Applicant submitted that Section 94 of the *Civil Procedure Act* which states:-

‘Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.’

Ensures judgment debtors are given a fair opportunity to comply to court orders before execution.



14. The Applicant submitted that the essence and procedure for taxation of costs after extraction of a decree and guide on repercussion to a party that does not seek leave, being that they are considered to have waived costs. It relied on the case of Vincent Edward Njoroge & 2 others v Kenol Kobil Ltd [2015] eKLR and Rashmi Malde v Mutsimoto Motor Company Ltd [2021] KEELRC 97 (KLR).

#### **Petitioner/Respondent's Submissions**

15. The Petitioner/Respondent submitted on two issues: whether the Applicant has met the prerequisites for grant of stay of execution of the judgment delivered on 11<sup>th</sup> October 2024 and consequential decree of the intended attachment and sale of Respondent's motor vehicles as proclaimed by Bemac Auctioneers; and whether the Applicant should be allowed to settle the decretal sum, costs and interests in 6 instalments.
16. On the first issue, the Petitioner/Respondent submitted that the Applicant has not demonstrated substantial loss and granting the orders sought is denying him a successful litigant the fruits of judgment. He relied on the case of James Wangalwa v Agnes Naliaka Cheseto [2012]eKLR.
17. The Petitioner/Respondent submitted that the Application was filed 111 days from the date of judgment which delay is inordinate; on this limb, the application should be dismissed.
18. The Petitioner/Respondent submitted that the Applicant should be directed to deposit Kshs. 1,552,346 in a joint interest earning bank account to be opened in the joint names of the Petitioner/Respondent's and or the decretal sum be deposited in this Court as security of costs if the Court finds it fit to grant the orders of stay of execution of the decree.
19. On the second issue, the Petitioner/Respondent submitted that in an application seeking to settle the decretal sum via instalments the court should be guided by the test in Rajabali Alidina Vs Remtulla Alidina & Another [1961] EA 565 which provides it should consider:-
- “(a) The circumstances under which the debt was contracted;
  - (b) The conduct of the debtor
  - (c) His financial position; and
  - (d) His bona-fides in offering to pay a fair proportion of the debt at once.”
20. In view of the foregoing, the Petitioner/Respondent submitted that it is not sufficient for the Applicant to state he will pay the decretal sum in instalments because of financial hardships which hardship has not been demonstrated to this Court.
21. I have considered the averments and submissions of the parties herein. The main issue for determination by this Court is whether to grant stay of execution and if so on what conditions.
22. The applicants aver that they are willing to pay the decretal sum save that they have had financial challenges and so seek to have an amicable agreement on how to pay in instalments. The respondents are opposed to any attempt that the applicant may make to deter them from getting their decretal sum.
23. In determining the application, I note that the applicant has not in any way demonstrated the financial difficulties they are facing. They have also not indicated how much they are willing to pay.
24. In Rajabali Alidina vs Remtulla Alidina & Another (1961) EA 565 set out what should be considered in determining whether or not to grant the prayers sought. Since the applicant has not in any way demonstrated any of the grounds thereon, I will however exercise my discretion and allow limited stay



of execution and direct that the applicant pays the decretal sum in 3 equal instalments with effect from the 30<sup>th</sup> of May 2025 and every 30<sup>th</sup> of each succeeding month until payment in full. In default execution to issue.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28<sup>TH</sup> OF APRIL, 2025.**

**HELLEN WASILWA**

**JUDGE**

