



Kenya Post Office Savings Bank v Aguvasu (Employment and Labour Relations Appeal E293 of 2024) [2024] KEELRC 2753 (KLR) (6 November 2024) (Ruling)

Neutral citation: [2024] KEELRC 2753 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E293 OF 2024**

JW KELI, J

NOVEMBER 6, 2024

BETWEEN

KENYA POST OFFICE SAVINGS BANK APPLICANT

AND

JOHN CHAVENE AGUVASU RESPONDENT

(Being on Appeal against the orders of the Chief Magistrate's Court at Nairobi (Hon. Lucy Ambasi (CM) dated the 12th day of September 2024 and 1st October 2024 in Miliman MCELRC MISC No. E013 of 2024)

RULING

(On the notice of Motion dated 2nd October 2024 as consolidated with an application of even date in Nairobi ELRC Appeal No. E0292 of 2024)

1. The applicant aggrieved with the decision of Hon L. Ambasi (CM) being the denial to certify the application dated 11th September 2024 as urgent and /or grant interim order of stay of execution file in instant application seeking the following orders:-
 - a. This application be certified urgent and heard ex parte in the first instance for the purpose of consideration and granting of prayer No. 2 hereof.
 - b. There be an ex parte interim order of stay of execution of the ex parte orders given on 27th August 2024 in Milimani Misc. MCELRC Misc. No. E013 of 2024 – *John Chavene Aguvasu v Kenya Post Office Savings Bank Limited* and further proceedings therein pending the inter partes hearing and determination of this application and the application dated 11th September 2024 in Milimani Misc. MCELRC Misc. No. E013 of 2024.
 - c. There be an order of stay of execution of the ex parte orders given on 27th August 2024 in Milimani Misc. MCELRC Misc No. E013 of 2024 – *John Chavene Aguvasu v Kenya*



Post Office Savings Bank Limited and further proceedings therein pending the hearing and determination of the appeal herein.

- d. The costs of this application be provided for.
2. The germane of the application was that the respondent vide Milimani Misc. MCELRC No. E 013 of 2024 *John Chevene Aguvasu v Kenya Post Officer Savings Bank Limited* had award of the Director of Occupational Safety and Health for the sum of Kshs, 1,600,958 adopted as Order of the Court and Decree issued without knowledge of the appellant/ applicant. That the applicant had before the Director objected to the award and re-assessment of the injury ordered but the respondent declined. That the first application for enforcement was before Justice Manani in Nairobi ELRC Misc No, E030 of 2024 where the Judge directed the Respondent submits himself for re-assessment but the said application was withdrawn. That the respondent opted to institute a fresh application before the Chief Magistrate Court wherein the Award was adopted as Order of the court on the 27th August 2024 and Decree issued.
3. The applicant stated that upon advice from its insurer, they applied to set aside the Order adopting the Award and for a stay of execution and for certification of the application as urgent of which neither was granted by the Hon. Magistrate leading to the instant application and the interlocutory appeal.
4. Together with the application the Applicant filed a memorandum of appeal dated 2nd October 2024 against the negative Orders of the Chief Magistrate Court dated 12th September 2024 and 1st October 2024.
5. The Appellant in the appeal contended that the Learned Magistrate failed, as she did, to properly evaluate the evidence presented by the Applicant on the record to appreciate the urgency of the application dated 11th September 2024 that was before her and thus arriving at an erroneous decision in refusing to certify the same as urgent and/or grant interim orders of stay of execution considering the circumstances.
6. That the learned trial magistrate acted in error when she failed, as she did, to properly exercise her discretion and judiciously thereby leaving the Appellant exposed to execution proceedings while the germane issue of service of the initial pleadings was still contested before her thereby rendering the proceedings pending before her an academic exercise and also tacitly condemning the Applicant/ Appellant unheard.
7. That the Learned Trial Magistrate erred in law and in fact in failing to be impartial and thereby denying the Applicant/ Appellant a reasonable opportunity to be heard before any adverse action in execution proceedings may be taken against it if at all.
8. The Appellant sought the following reliefs:-
 - a. This Appeal be and is hereby allowed.
 - b. The Orders of the Chief Magistrate's Court at Milimani in MCELRC Misc. No. E013 of 2024 – *John Chavene Aguvasu v Kenya Post Office Savings Bank Limited* issued on 12th September 2024 and 1st October 2024 refusing to grant stay of execution and/or other status quo or preservative orders be and are hereby set aside and substituted with and order granting stay of execution of the order given by the lower court on 27th August 2024 in the said Milimani MCELRC Misc. No. E013 of 2024 against the Appellant pending hearing and determination of the application dated 11th September 2024.



- c. The application dated 11th September 2024 and indeed, the matter of Chief Magistrate's Court at Milimani in MCELRC Misc No. E013 of 2024 – *John Chavene Aguvasu v Kenya Post Office Savings Bank Limited* be referred to another magistrate other than Hon. L. Ambasi (Mrs.) CM for hearing and determination of the pending issues.
 - d. The Appellant be granted the costs of this Appeal.
 - e. That this Honourable Court be pleased to make any further orders and directions that it may deem fit and just in the circumstance of the case.
9. The Court on the 4th of October 2024 considered the instant application *ex parte*, and granted a temporary order of stay of execution of the Orders of 27th August 2024 in Milimani in MCELRC Misc. No. E013 of 2024 – *John Chavene Aguvasu v Kenya Post Office Savings Bank Limited* pending in the interpartes hearing and determination of the application.
 10. The Respondent did not file a response.
 11. The application was heard interpartes on the 6th November 2024 where counsel for both parties made oral submissions. Mr. Ochieng for the applicant/ appellant relied on the grounds in the application and the supporting affidavit of Grace Maina of 2nd October 2024 together with the annexures therein. Among the annexures was the application dated 11th September 2024 filed under certificate of urgency of even date, in Milimani in MCELRC Misc. No. E013 of 2024 – *John Chavene Aguvasu v Kenya Post Office Savings Bank Limited* seeking the following orders:-
 - a. This application be certified urgent and heard *ex parte* in the first instance.
 - b. There be a stay of execution of the *ex parte* Orders and Decree given herein on 27th August 2024 pending the interpartes hearing and determination of the application.
 - c. This Honourable court be and is hereby pleased to set aside the *ex parte* orders and decree given herein on 27th August 2024 herein for adoption of the award of the Director dated 5th December 2023 as an order of the court
 - d. Consequent to the granting of prayer number 3 above, the respondent be and is hereby granted leave to file a Replying Affidavit in response to the application dated 18th June 2024.
 - e. The cost of the application be provided for.
 12. The applicant contended that despite the evidence before the lower court the Hon Magistrate failed to certify the application urgent or grant interim orders of stay. The Hon. Magistrate simply directed that the respondent be served for hearing on 1st October, 2024 exposing the applicant to execution and indeed on the 2nd October 2024 the auctioneer visited their premises for execution of warrants of attachment (GM1-a, was warrants of attachment)
 13. That on 1st October 2024 when the parties appeared before the Hon. Magistrate the applicant still prayed for a stay of execution which was rejected and the Hon. Magistrate directed the application be canvassed by way of written submissions and gave mention date of 22nd October 2024 to issue a ruling date.
 14. The instant application was canvassed orally. There was no written response on record.
 15. Counsel or the Respondent, Mr. Odhiambo told the court that they were not opposed to the application prayer b and that the court could grant the prayer for stay of execution of the Orders of 27th August 2024 pending the hearing and determination of the application dated 11th September



2024 before the chief magistrate court. Prayer c of the Application was for stay of execution upto determination of the appeal. Mr. Odhiambo further told the court the appeal could be compromised by grant of prayer 2 of the appeal. Mr. Odhiambo submitted that prayer 3 of the appeal was not justified. Prayer 3 of the appeal sought to have the court order that the application dated 11th September 2024 be heard by any other Magistrate other but Hon. L Ambasi(CM).

16. Mr. Ochieng for the Applicant, in reply, reiterated the grounds of the appeal and application and stated that the Hon. Magistrate by conduct and words uttered on the 12th September 2024 and 1st October 2024 demonstrated bias and that justice ought to be seen to be done.

Decision

17. The Court discerned from the oral submissions of the respondent's counsel that he was agreeable to comprise both the application and appeal by agreement to grant of prayer b of the application and prayer 2 of the appeal. By grant of prayer 2 of the appeal prayer c of the application stood compromised.
18. The court discerned the only outstanding issue for determination was in regard to prayer 3 of the appeal to wit:- "The application dated 11th September 2024 and indeed, the matter of Chief Magistrate's Court at Milimani in MCELRC Misc No. E013 of 2024 – *John Chavene Aguvasu v Kenya Post Office Savings Bank Limited* be referred to another magistrate other than Hon. L. Ambasi (Mrs.) CM for hearing and determination of the pending issues."
19. The court having heard the parties and considered the application and annexures therein finds merit in prayer c of the appeal for the application dated 11th September 2024 to be heard by any other magistrate with jurisdiction other than Hon. L. Ambasi(CM)
20. The court finds that whereas the grant of the orders of certification of application as urgent and grant of interim orders of stay of execution is a discretion of the Court of which this Court should sparingly interfere with, the said discretion should be exercised judiciously and not at whim.
21. At the stake of any application before the Court is justice to be done and be seen to be done. The court in application for setting aside a judgment, must aim to sustain the subject matter of proceedings. This is to ensure that the proceedings for setting aside the Order of the court, in this case which adopted the award as Order of the court and a Decree ensued, are not rendered nugatory vide execution. The applicant in the application dated 11th September 2024 exhibited the threat of execution being Exhibit GM1-a which included the warrants of attachment and proclamation notice.
22. The Court is satisfied that the Applicant justified reasons for its lack of confidence in the trial magistrate(Hon. L. Ambasi, CM). The application dated 11th September 2024 was brought under Order 10 Rule 11 of the Civil Procedure Act for setting aside judgment. The court finds that the condition of grant of stay of execution under Order 42(6) of the Civil Procedure Rules were applicable in exercise of the discretion of the Hon Magistrate. The cornerstone of a grant of stay of execution is the demonstration of substantial loss as held in *James Wangalwa & another v Agnes Naliaka Cheseto* Misc Application No 42 of 2011 [2012] eKLR where Gikonyo J observed:-

"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 v. Chesoni* [2002] 1 KLR 867, and also in the case of *Mukuma v 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.”

23. The Court finds that the Applicant demonstrated before the lower court a real risk of substantial loss vide annexure GM1-a being warrants of attachment and proclamation notice of the adopted award sought to be set aside. The Court holds that the Hon. Magistrate ought to have addressed her mind to the question of substantial loss to the Applicant in exercise of her discretion to reject the prayers for certification of the application as urgent and of an interim stay pending the hearing and determination of the application.
24. In the upshot the outstanding prayer 3 of the appeal to wit:- 'The application dated 11th September 2024 and indeed, the matter of Chief Magistrate's Court at Milimani in MCELRC Misc No. E013 of 2024 – *John Chavene Aguvasu v Kenya Post Office Savings Bank Limited* be referred to another magistrate other than Hon. L. Ambasi (Mrs) (CM) for hearing and determination of the pending issues'; is held merited.
25. In the upshot the application dated 2nd December 2024 is allowed as follows:-
 - a. There be an ex parte interim order of stay of execution of the ex parte orders given on 27th August 2024 in Milimani Misc. MCELRC Misc. No. E013 of 2024 – *John Chavene Aguvasu v Kenya Post Office Savings Bank Limited* and further proceedings therein pending the inter partes hearing and determination of this application and the application dated 11th September 2024 in Milimani Misc. MCELRC Misc. No. E013 of 2024.
 - b. There be an order of stay of execution of the ex parte orders given on 27th August 2024 in Milimani Misc. MCELRC Misc No. E013 of 2024 – *John Chavene Aguvasu v Kenya Post Office Savings Bank Limited* and further proceedings therein pending the hearing and determination of the appeal herein.
 - c. No order as to costs.
26. The appeal dated 2nd October 2024 is compromised as follows:-
 - a. This Appeal be and is hereby allowed.
 - b. The Orders of the Chief Magistrate's Court at Milimani in MCELRC Misc. No. E013 of 2024 – *John Chavene Aguvasu v Kenya Post Office Savings Bank Limited* issued on 12th September 2024 and 1st October 2024 refusing to grant stay of execution and/or other status quo or preservatory orders are hereby set aside and substituted with an order granting stay of execution of the order given by the lower court on 27th August 2024 in the said Milimani MCELRC Misc. No. E013 of 2024 against the Appellant pending hearing and determination of the application dated 11th September 2024.
 - c. The application dated 11th September 2024 in the matter of Chief Magistrate's Court at Milimani in MCELRC Misc No. E013 of 2024 – *John Chavene Aguvasu v Kenya Post Office*



Savings Bank Limited is Hereby referred to another Magistrate with jurisdiction other than Hon. L. Ambasi (Mrs.) CM for hearing and determination of the pending issues.

d. No order as to costs.

27. The ruling to apply in the disposal of the application and appeal of even dates in ELRC Appeal No. E292 OF 2024 Kenya Post Office Savings Bank v Innocent Moturi respectively.

28. It is so Ordered.

DATED, DELIVERED, AND SIGNED IN OPEN COURT AT NAIROBI THIS 6TH DAY OF NOVEMBER, 2024.

JEMIMAH KELI

JUDGE

In the presence of:

C/A- Caleb

Applicant/ Appellant – Mr. Ochieng

Respondent- Mr. Odhiambo

