



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

ELRC CAUSE NO. 259 OF 2015

JANE JEROTICH SIRMA.....CLAIMANT

-VERSUS-

POSTAL CORPORATION OF KENYA..... RESPONDENT

RULING

1. This ruling is in respect of the Respondent/applicant's application dated 10th March, 2021 filed under certificate of urgency on 12th March, 2021 via the firm of Mirugi Kariuki & Company advocates pursuant to Order 22 Rule 22, Order 51 Rule 1 of the Civil procedure Rules, Section 1A, 1B, 3A and 44(2) of the Civil Procedure Act and section 25 of the Postal Corporation Act and all other enabling provisions, seeking the following orders;

- 1) THAT this Application be certified as urgent and service thereof be dispensed with in the first instance.**
- 2) THAT this Application be heard and stay of execution herein be granted ex-parte in the first instance pending determination of this application.**
- 3) THAT this Court be pleased to confirm and specifically order that the Kshs 470,757.72 being the assessed amount of loss of user of the Respondent's Motor Vehicle KAD 294M following its irregular attachment by the Claimant and the costs of Respondent's application dated 25th November, 2019 be set off against the Claimant's award or any outstanding balance thereof as claimed by the Claimant.**
- 4) THAT the Claimant and her Advocates be hereby restrained from attaching or threatening attachment against the Respondent henceforth, having been fully paid the amount due to them.**
- 5) THAT in any event, the Claimant be restrained from attaching the Respondent's property, having appealed against the Court's ruling delivered on 6th February, 2020.**
- 6) THAT the Claimant be restrained from unlawfully attaching the Respondent's property for a 2nd time, in blatant abuse of this Court's process.**
- 7) THAT the Claimant be ordered to pay the costs of the application as awarded by the Court on 6/2/2020 forthwith prior to any other proceedings herein plus the costs hereof.**

2. The application is supported by the grounds on the face of the application and the affidavit sworn on 10th March, 2021 by, **Samuel Mburu**, the Respondent's Legal services manager and based on the following grounds: -

- (a) That, on 6th February, 2020, this Court, the Hon. M. Mbaru, L.J delivered her ruling wherein it found the Claimant's execution process was unlawful and irregular.
- (b) The Court ordered the Respondent to assess the loss in the non-user of their "attached motor vehicle KAD 294M from the date of irregular attachment until the date of release, and address the Court accordingly.
- (c) That, the Respondent vide its assessment report dated 4/3/2020 duly assessed its loss at Kshs 470,757.71 as ordered by Court, which report was duly filed and is thus in the Court record and the same served upon the Claimant Which Claimant has never challenged the assessment nor the said assessed sum neither has she paid costs to the Respondent as Ordered vide the Court ruling of 6/2/2020.

(d) The Claimant has filed an Appeal against this Court's ruling of 6/2/2020 in Court of Appeal being Appeal Serial No. CA NAK 47 OF 2020 and cannot possibly execute this Court's decree yet at the same time pursue an appeal against the same.

(e) The Claimant is currently threatening to unlawfully attach the Respondent's property to recover an alleged balance on their Claim at Kshs 310,242.20 and the Claimants costs taxed at Kshs 330,646, which is clearly unjustifiable given the amount in assessed loss of user and costs of the application that the Claimant owes the Respondent.

(f) That this Court thus ought to specifically order that the Respondent's claim for loss of user assessed as ordered and costs of the Respondent's application dated 25th November 2019 as awarded be set off against any claim that the Claimant would have against the Respondent.

(g) Having filed an appeal being Serial No. C.A NAK 47 of 2020 against this Court's ruling. the Claimant cannot purport to execute this Court's judgment in the same vein.

(h) That, the Court ordered that the Claimant shall pay for the loss of user losses occasioned by the Respondent by her unlawful attachment was both specific and mandatory and was not made in vain and cannot be brushed off by the Claimant and her Advocates as they have done.

(i) That the threatened execution is in contravention of the express provisions of Section 25 of the Postal Corporation Act, Act No. 3 of 1998 which restricts execution against the Respondent.

3. In opposing the application, the claimant, **Jane Jerotich Sirma**, swore a replying affidavit dated 25th March, 2021 on the following grounds;

a) That by a decree dated 11th March, 2019, the court awarded her the sum of Kshs.1,974,531 with costs of the suit which were taxed at Kshs330,646 making a total of Kshs. 2,305,177 which the respondent has paid Kshs 1,278,631.40 inclusive of tax leaving a balance of Kshs 1,026,454.60/-

b) That a sum of Kshs. 261,633.50 was paid on 14th February, 2018 and another sum of Kshs 633,378.60 paid on 23rd October, 2019 which amount was exclusive of tax.

c) That the court by its ruling of 6th February, 2020 ordered that a sum of Kshs.323,136/- be deducted from the amount due to her. She states that out of the Kshs703,378.60 , Kshs 372,732.60 is subject to tax deduction, whereas the sum of Kshs.330.646 is in respect to the party to party costs.

d) That when the ruling was delivered the respondent/ applicant sought for stay for 30 days and when the stay lapsed they filed this instant application to evade payment of the decretal sum.

e) That the loss of user of the said motor vehicle was never ordered to be set off from the decretal sum. Further that the only amount ordered to be deducted from the decree was a sum of Kshs. 323,136/- being recovery of house loans and other debts owed to the respondent from the employment.

f) She stated further that this court is *functus officio* to order any set-off on the alleged loss of user figure of Kshs 470,757.72 and that the respondent ought to file appropriate proceedings to recover that sum if any.

g) That the Respondent has not filed his bill of costs to ascertain any monies owed to it and that she has not also taxed her application of 11th November, 2020 which costs were awarded to her.

h) That the issue of the Respondent be protected under section 25 of the Postal Corporation Act from execution was dealt with in the Application dated 25th November, 2019 and therefore is *res judicata*.

i) She stated that the Appeal is with regard to the deduction of Kshs 323,136.00 being the house loan owed only and does not touch on execution of the entire sum.

4. The parties herein disposed of the application by way of written submissions with the applicant filing on 26th May, 2021 and the Respondent on 14th July, 2021.

Applicant submissions

5. The Applicant submitted that judgment in this suit was delivered by Justice Radido on the 17th November, 2017 to wit, the claimant was to be paid one month salary in lieu of Notice of Kshs.21,255, salary and house allowance from the date of suspension on 3.11.2007 to date of dismissal on 11.7.2013 of Kshs 1,069,126/-, unpaid house allowance of Kshs.53,255/- and ten months gross wages of Kshs. 352,550/-. He argued that in addition to the above the taxed costs were capped at Kshs. 280,102 which the Claimant disputed and the same was revised to Kshs 330,646/-.

6. It is the Applicant's submissions that, the Claimant illegally attached its motor vehicle Registration number KAD 294M in an attempt to execute its decree which court stopped and directed the claimant to pay the Respondent for the loss of user of the vehicle throughout the

period from the time of attachment on 15.11.2019 till release on 16.12.2019 which the Respondent assessed at Kshs 470,757.71. further that the Court directed the Respondent to deduct Kshs. 323,136 being outstanding house loan taken by the claimant while at the Respondent employment. The Applicant submitted further that, the Court awarded it the costs of the Application dated 25th November, 2019 which had sought the release of its motor vehicle based on illegal attachment which costs were capped at Kshs 109,430 and is yet to be taxed.

7. It was submitted that the current application seeks to compel the Claimant to compensate the Respondent for the loss of use of its motor vehicle following the illegal attachment by the claimant which the Court found the same to be illegal by its ruling of 6th February, 2020. He argued further that the loss of use arose out of the actions of the claimant and therefore its only logically that the Claimant be compelled to compensate them and or set off against the decretal sum.

8. On whether the Court is functus officio, the Applicant submitted that this Court is ceased on this matter as its currently at execution stage and the only issue pending for the matter to be settled is for the Court to give a determination whether the Claimant ought to be compelled to pay the loss of user of its motor vehicle which is assessed at Kshs 470, 757.71 and the same be set off from the claimant's decretal sum. He argued further that the loss of user emanated from the illegal actions of the claimant in trying to illegally execute its decree therefore they ought to be compelled to pay the said amount or the same be set off from the decretal sum which the applicant stated that it is obliged to pay the balance of the decretal sum if any.

Respondents submissions.

9. The Respondent/ Claimant on the other hand disputed the amounts the applicant alleged to have paid her and stated that her total award plus Costs amounts to Kshs 2,305,177/- which he has only received a sum of Kshs 1,278,631.40 inclusive of tax and Kshs 895,012.12 exclusive of tax. He further submitted that the amount due to her after deducting the loan of Kshs 323, 136.60 is Kshs 703,378/- out of which Kshs 330,646 is the party to party costs while Kshs 372,732.60 is the balance of the decretal sum which is subject to statutory deductions which monies have not be paid to date.

10. On whether the Order for review issued on 6th February, 2020 can be reviewed further to include the loss of user of the motor vehicle, it was submitted that Order 45 Rule 6 of the Civil procedure Rules does not allow a party to seek review of an Order emanating from review proceedings and cited the case of **Equity Bank Limited –v-v Neptune Credit Management Limited [2012] eKLR**.

11. He argued that the loss of user of the Applicant's motor vehicle, subject of this Application ought to be dealt with in a separate suit and be specifically proved.

12. I have examined the averments of the parties herein. This court in its Ruling of 6/2/2020 made a finding that:-

“...iii) The respondent shall assess the loss of non-user of attached motor vehicle KAD 294M from the date of irregular attachment until release and address accordingly..”

13. The respondents aver that they assessed their non-user and the amount came to kshs.470,757.72/=.

14. This is what they seek to be offset from what is payable to the claimant.

15. That notwithstanding the amount of 470,757.72 cannot be said to be what is the loss suffered by respondent without being subjected to assessment by court.

16. In the same vein, the respondents cannot also proceed to levy attachment while at the same time pursuing an appeal before the Court of Appeal.

17. In the circumstances, I find the application for stay of execution is merited.

18. I order that any attachment by the claimant is stayed pending assessment of loss of user by the respondent on their motor vehicle KAD 294M and upon further orders of this court.

RULING DELIVERED VIRTUALLY THIS 22ND DAY OF JULY, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Githiru for Applicant – present

Konosi for respondent – present

Court assistants – Fred and Wanyoike