



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**MISCELLANEOUS APPLICATION NO. 181 OF 2015**

**NOL TURESH LOITOKITOK WATER AND SANITATIONS CO. LTD**

**(Successor in the title of NATIONAL WATER CONSERVATION AND**

**PIPELINE CONSERVATION.....APPLICANT**

**VERSUS**

**PATRICK NDUNGU WAITHAKA.....1<sup>ST</sup> RESPONDENT/APPELLANT**

**JOHN GATHARA MAINGI.....2<sup>ND</sup> RESPONDENT /APPELLANT**

**DONALD WALKER ANDOLO.....3<sup>RD</sup> RESPONDENT/APPELLANT**

**AND**

**TANATHI WATER SERVICES BOARD.....4<sup>TH</sup> RESPONDENT**

**RULING OF THE COURT**

1. The Applicants herein filed a Notice of Motion dated 14/12/2016 expressed to be brought under Section 80, 3 and 3A of the Civil Procedure Act Order 51 of the Civil Procedure Rules for the following reliefs namely:-

**1. Spent**

**2. The Honourable court be pleased to stay the execution of the ruling delivered on the 24/11/2016 and the subsequent order extracted on the 1/12/2016 pending the hearing and determination of the Application.**

**3. The Honourable court be pleased to review the ruling delivered on the 24/11/2016.**

**4. The Honourable court be pleased to vary its orders for reconnection to include an obligation for payment for consumption of water by the 1<sup>st</sup> – 3<sup>rd</sup> Respondents.**

**5. Costs of the application be provided for.**

2. The Application is supported by the Affidavit of **Thomas Kibet Korir** sworn on even date and further on the following grounds namely:-

**a. That the Applicant has already complied with the order requiring the reconnection to the water accounts belonging to the 1<sup>st</sup> and 3<sup>rd</sup> Respondents.**

**b. That there exists fresh evidence that proves that the Applicant had reconnected the water accounts to the orders of the water appeals board which did not bar the Applicant from charging water consumed by the three Respondents.**

**c. That the same was inadvertently not availed before the Honourable court before it reached its determination of the contempt application.**

**d. That it is in the interest of justice for this Honourable court to consider the same before and review its determination based on**

*all material facts.*

*e. That the Applicant is ready and willing and has at all times obeyed court orders.*

*f. That the Respondents will not suffer any prejudice if the application is allowed.*

3. The Application was strenuously opposed by the 1<sup>st</sup> – 3<sup>rd</sup> Respondents who filed a replying affidavit through the 1<sup>st</sup> Respondent herein Patrick Ndungu Waithaka raising the following grounds of opposition:

*i. That the Applicant is yet to reconnect water account number 060040399.*

*ii. That the Applicants are misleading the court on the claim that they were unable to bring facts before court yet they had admitted through its managing director Jeremy Mutende that they disobeyed the court orders as they had not been accompanied with a penal notice.*

*iii. That the Applicants have only purported to come up with some documents upon the service of orders for committal to jail disguised as new facts for review so as to avoid the rigours of the court orders.*

*iv. That the Respondents contend that the Applicant is out to manufacture evidence or documents so as to evade complying with orders of the court and which should not be allowed.*

*v. That the Applicants had already presented their facts and submissions and there is thus no error apparent on the face of the record to warrant a review.*

*vi. That the Applicants having lost their case in the contempt proceedings should not be allowed by this court to abuse its process by seeking to seal loopholes in their weak case by introducing new and fabricated evidence.*

*vii. That the Applicant had been given ample opportunity to present their evidence and arguments and as such there must be an end to litigation.*

*viii. That the Applicant has not demonstrated how the alleged and purported new and compelling evidence or reconnection of water was not within their knowledge after due diligence yet they had been served and were represented by an advocate all the way to submissions and as such this court's order dated 24/11/2016 should be implemented.*

*ix. That the clam by Applicant of unpaid water bills is an afterthought since the Respondents should have been served with notices and in any case the same should have been stated in the contempt Application dated 2/9/2015 and filed in court on 10/09/2015 and further none of such evidence has been presented to this court to justify the review being sought.*

*x. That if there were any accumulated water bills, the same should have been raised with the Water Appeals Board vide Appeal No. 19 (ws) of 2014.*

*xi. That the application dated 14/12/2016 is a non starter and ought to be struck out and the contemnors be committed to civil jail.*

4. Parties herein agreed to canvass the Application by way of written submissions. It was submitted for the Applicant that the order by the Water Appeals Board for the reconnection of the water accounts had long been complied with by the Applicant prior to the filing of the contempt Application dated 2/09/2015 and therefore there was no contempt of any court orders. It was further submitted that the Applicant is entitled to charge for any water consumed so as to protect the Applicant from being driven out of business. Reliance was placed under Section 80 of the Civil Procedure Act and the case of **NUH NASIR ABDI =VS= ALI WARIO & 2 OTHERS [2013] eKLR** where the court held that a decision whether or not to vary, set aside or review earlier orders was an exercise of judicial discretion and the court could only exercise such discretion if so to do would serve useful purpose.

It was submitted for the Respondents that this court should exercise great care and caution as the Applicant who had lost in the contempt Application was trying to procure evidence with which to strengthen its weak part of its case and it should prove that there was no remissness on its part in adducing the evidence at the hearing. The case of **D.J. LOWE & COMPANY LTD VS BANQUE INDOSUEZ – CIVIL APPEAL NO.NBI 217 OF 1998**. It was the contention of the Respondents that the issue of discovery of new evidence should not arise since such evidence had been within the knowledge and reach of the Applicants at the time of the contempt Application. Further it was submitted that to date the Applicant has not even reconnected water account number **060040399** despite the orders of court. The Applicant partly complied by reconnecting accounts **060002191, 060006421, 06000175** and **0600010316** at the time of filing the present application. It was further submitted that allowing the application would set a bad precedent whereby parties in contempt would bypass the orders of court by seeking refuge in the claim of discovery of new evidence.

5. I have considered the Applicant's Application dated 14/12/2016 and the two affidavits in support thereof plus the grounds. I have also considered the replying affidavit of the Respondents. I have also considered the submissions of the learned counsels for the parties as well as the authority cited. It is not in dispute that vide the ruling herein of Justice E. Ogola dated 24/11/2016 the Applicants Manager Jeremy T. Mutende was found to be in contempt of court and was ordered to pay a fine of Kshs. 1,500,000/= and in default be committed to jail for five months. It is this order which precipitated the present application for stay of execution as well as a review of the said order. I find the only issue necessary for determination is whether the Applicant has satisfied the grounds for review.

6. An order for review is found in Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. **Section 80 of the said Act provides as follows:-**

*“Any person who considers himself aggrieved;*

*a. by a decree or order from which an appeal is allowed by this Act but from which no appeal has been preferred or;*

*b. A decree or order from which no appeal is allowed by this Act.*

*May apply for review of judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.*

Order 45 Rule 1 of the Civil Procedure provides as follows:-

45(1) any person considering himself aggrieved:-

*a. By a decree or order from which an appeal is allowed but from which no appeal has been preferred; or*

*b. By a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be procured by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason desires to obtain a review of the decree or order may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.”*

7. The Applicant from his Application and the affidavit in support claims that there exists fresh evidence which proves that the Applicant had already reconnected the water accounts pursuant to the orders of the Water Appeals board and therefore this court ought not to have found the Applicant's manager in contempt of the said orders. It is further the Applicant's contention that the said evidence was inadvertently not availed before the court when the contempt Application was being determined. It is also the Applicant's contention that this court should vary the orders for reconnection to include an obligation for the payment for consumption of water by the Respondents.

8. The Respondents appear to be not convinced by the Applicant's assertions and is their view that the Applicant is taking this court for a ride in that the contempt Application dated 2/09/2015 substantially dealt with the issues in which the Applicant's manager Jeremy T. Mutende had stated that the Applicant had clearly declined to obey the court order to reconnect the water accounts because there had been no directive as to any penal notice or consequences upon default. Indeed the ruling of Justice Ogola dated 24/11/2016 held that a flagrant disobedience of a court order if allowed to go unchecked will result in the onset of an erosion of judicial authority and that the lack of a penal notice as contended by the Applicant herein did not give them a latitude to disobey the court orders. Indeed this court in the said ruling observed the sentiments of the Water Appeals Board which had issued the initial orders for reconnection when it pointed out that the court orders were not requests which the Applicant could choose to disobey. This court in its said ruling stated that it was satisfied that there existed lawful orders which had been duly served upon the Applicant herein and which it willfully chose to disobey and should therefore suffer the consequences arising from the contempt proceedings.

9. It is noted that the Applicant herein has sought for a raft of prayers namely stay of execution, review of the orders of 24/11/2016 and a request for varying orders for reconnection to include an obligation for paying for consumption of water by the Respondents. The Respondents have urged this court to be wary of the Applicant's conduct in filing the present Application so as to avoid being misled. I find it was the duty of the Applicant to show to the satisfaction of the court that there has been a discovery of new and important matter or evidence which was not within its knowledge or could not be produced at the time when the order to be reviewed was made or go further to show that there was a mistake or error apparent on the face of the record or for any other sufficient cause.

The Applicant filed two affidavits in support of the Application the gist of which is that they had already reconnected the water accounts on 16/01/2015 as directed by the Water Appeals Board and therefore they were not in contempt at all as claimed by the Respondents. However, I note that the Applicant has not given a plausible explanation to the effect that at the time the contempt Application dated 2/09/2015 was being filed, they did not have the requisite information so as to dissuade this court from allowing the said Application for contempt. The Applicant has not presented any reasons at all to the effect that they had exercised due diligence but nonetheless did not manage to present the new evidence to the court in time. The Applicant has merely stated that the reconnection exercise was carried out in the presence of the Respondents two of whom are alleged to have declined to sign the document. The Respondents herein have denied the said allegations and maintained that the Applicant ought to have availed the evidence at the time of the prosecution of the contempt Application. The Applicant has not demonstrated when it came to know about the existence of reconnection of water accounts or that it could not obtain the evidence despite due diligence. The Applicant has also not alleged that there is an error apparent on the face of the record. The Applicant was under a duty to demonstrate the existence of new evidence which it could not get even after exercising due diligence. In fact in the contempt Application dated 2/09/2015 the Applicant's manager Jeremy T. Mutende had stated in his replying affidavit that the only reasons they disobeyed the order was that there had been no penal notice raised in the Application and order. At no time did the said manager indicate that the water accounts had already been reconnected way back on 16/01/2015 in compliance with the directive of the water Appeals Board. It was on that basis that this court found the Applicant in contempt of the court order. It then seems to lend credence to the Respondents assertions that the alleged new evidence has been manufactured by the Applicant so as to defeat the cause of justice by seeking to re-open the case. I am not persuaded by the reasons offered by the Applicant as the same have not satisfied the conditions set by order 45 Rule 1 of the Civil Procedure Rules. The case of **EVAN BWIRE =VS= ANDREW NGINDA – CIVIL APPEAL NO. 103 OF 2000** at Kisumu held as follows:-

*“An Application for review will only be allowed on very strong grounds. Particularly if its effect will amount to re-opening the Application or case afresh.”*

10. The Applicant herein seeks this court to vary the orders for reconnection to include an obligation for paying for consumption of water by the Respondents. It must be noted that the order for reconnection had been granted by the Water Appeals Board and therefore this court is not the right forum to ventilate such a claim. This clearly shows that the Applicant is out to have the case reopened and to be heard afresh. Again the Respondents have averred that the Applicant is yet to reconnect water account number 060040399 and therefore their claim that it had carried out reconnection on 16/1/2015 is further put into doubt. This then leaves no doubt that the Applicant is out to delay the course of justice and is undeserving of this court's discretion under Section 3 and 3A of the Civil Procedure Act. As the Applicant has not presented sufficient explanation to justify an order for review, I find the present application is an abuse of the court process as it does not satisfy the grounds for review.

11. In the result it is the finding of this court that the Applicant's Application dated 14/12/2016 lacks merit. The same is ordered dismissed with costs to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

Orders accordingly.

**Dated and Delivered at Machakos this 26<sup>th</sup> day of February, 2018.**

**D. K. KEMEI**

**JUDGE**

**In the presence of:-**

Munyao for the Applicant

Mungania for the Respondents

Kituva - Court Assistant