



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**MISC. CIVIL APPLICATION NO 18 OF 2013**  
**IN THE MATTER OF THE WATER ACT , 2002**

**AND**

**IN THE MATTER OF THE WAER APPEALS BOARD RULES, 2007**

**AND**

**IN THE MATTER OF AN APPICATION FOR FILING, ADOPTION AND ENFORCEMENT  
OF THE AWARD OF THE WATER APPEAL BOARD IN APPEAL NO 3 (WS) OF 2008 DATED  
2ND MARCH, 2012**

**HONOURABLE KABEERE M'MBIJIWE .....APPLICANT**

**AND**

**TANA WATER SERVICES BOARD..... 1ST RESPONDENT**

**COUNTY GOVERNMENT OF MERU..... 2ND RESPONDENT**

**MERU WATER AND SEWERAGE SERVICES REGISTERED**

**TRUSTEES.....3RD REPENDENT**

**RULING**

1. This application brought to Court by way of Notice of Motion is dated 28th March, 2013, It seeks orders:-

**1. THAT Judgment and/or decision of the Water Appeals Board in Appeal No. 3 (W.S) of 2008 in favour of the Appellant and the draft decree attached herewith be and are hereby adopted for execution and enforcement.**

**2. THAT the Court do make such further orders as it deems appropriate in the circumstances.**

**3. THAT the costs of the application be borne by the Respondents.**

2. This application is supported by the affidavit of the applicant Hon. Kabeere M' Mbiyiwe and has the following grounds:-

**1. The Water Appeal Board made a decision in favour of the Applicant.**

**2. That the Respondents have not paid the Applicant in accordance with the decision /Judgment.**

3. The Applicant's supporting Affidavit, sworn on 28th March, 2013, states as follows:-

I, HON. GIBERT KABEERE M'MBIJIWE, a resident of Meru of Post Office Box Number, 86, Meru do make oath and state as follows:-

**1. THAT I am the Appellant herein fully versed with the facts of this case and thus competent to make this affidavit.**

**2. THAT I have read and understood the Application, draft decree and final judgment of the Water Appeals Board delivered on 2nd March, 2012.**

**3. THAT the Water Appeal Board made an award in my favour in Appeal No. 3 (W.S) of 2008 on the 2nd March , 2012, the Appeal I lodged against the Respondents' therein. The Award amount is as stated in the draft decree and the Award itself accompanying this application.**

**4. THAT the Respondents' should pay me the said award amount as no stay of execution orders have been issued by a Court of competent jurisdiction to stay enforcement of the award.**

**5. THAT I am an old man aged 88 years, a senior citizen, now and I need to be compensated for the loss and damage I suffered as soon as possible.**

**6. THAT I am advised by my advocate Mr. Lutta and verily believe the same to be true that the Respondents cannot continue to occupy my property without payment and simultaneously hold the compensation awarded to me by the Water Appeal Board.**

**7. THAT I make this affidavit in support of the application hereof praying that the Water Appeal Board final award be recognized by this Honourable Court as binding and that this Court do grant me leave to enforce the Final Award as a decree.**

WHAT is stated herein is true and within my personal knowledge save for what is deponed to on information belief sources which have been stated elsewhere herein.

4. By an application dated 14th July, 2015, the Applicant, inter alia, sought an order that the County Government of Meru be substituted as the 2nd respondent in place of the Municipal Council of Meru. On 22nd July, 2015 by Consent, the parties asked the Court to allow the application.

5. The Applicant through his Advocates, Lutta and Company says that he is the registered proprietor of Land Parcel No. NTIMA/IGOKI/2032 within Meru County. He states that at a Certain point in time, the defunct Municipal Council of Meru, trespassed on this parcel of land and established a water treatment plant where it processed and sold water through its water department to consumers within Meru Town and its environs. He says that sadly the Meru Municipal Council did not seek the applicant's permission to enter onto the premises and to construct the water treatment works. He states that no compensation was offered to him.

6. The Applicant tells the Court that inspite of lengthy correspondence and unheaded legal demands, the Municipal Council did not vacate his premises and also did not make an offer to pay compensation to him.

7. The Applicant asserts that in the course of time, the legislation relating to water matters was amended and as a result several legal bodies were created to manage infrastructure, production and supply of water and sewerage services. He states that the 1st Respondent was created to take over ownership of the properties that were before 2002 vested in the Ministry of Water of the Government of the Republic of Kenya. As a result of changes in legislation, infrastructures and buildings used for processing of water and sewerage in Meru Town and its environs was placed under a body corporate known as MERU

WATER AND SEWERAGE SERVICES REGISTERED TRUSTEES, the 3rd Respondent herein. This body effectively took over the functions hitherto performed by the defunct Municipal Council of Meru, now replaced by the County Government of Meru. The Applicant asserts that the County Government of Meru continues to be a stakeholder in Meru water undertakings.

8. The Applicant submits that the Water Appeal Board is an inferior tribunal to this Court and that orders issued by it have to be enforced by this Court through an application by any of the parties to have such orders be adopted. The applicant states that this is the rationale that buttresses this application.

9. The Applicant states that the application is predicated on Rule 34(1) and 2 of the Water Appeal Board Rules, 2007 which provides as follows:-

***“Rule 34 (1) The decision of the Board and a draft decree shall be filed in the High Court by the parties for execution and enforcement as if it were an order of that Court.***

***(2) An order or Decree shall agree with the decision and specify clearly in paragraphs the relief granted or other determination and costs, if any”.***

10. The Applicant asserts that he has complied with the requirements of the Water Appeal Board Rules in that:-

***(a) He has filed a draft decree.***

***(b) He has attached the apposite judgment.***

***(c) The draft decree agrees with the decision of the Board.***

11. The Applicant tells the Court that the 1st Respondent filed a Replying Affidavit deponed by Eng. M.M. Naivasha sworn on 14th May, 2013 in opposition to the Applicants application. Regarding the 2nd respondent he says that it did not file any grounds of opposition or a Replying Affidavit despite leave having been granted on 8th October, 2015. Although the Applicant does not explicitly so state, he seems to suggest that the 2nd Respondent did not oppose this application.

12. The Applicant says that the 3rd Respondent fled two Replying Affidavits in opposition to the application. He states that the 1st and 2nd Respondents grounds of opposition to the application are that there are three pending appeals in the High Court against the apposite judgment, these being Meru High Court Civil Appeal Numbers 28 of 2012, 30 of 2012 and 31 of 2012. He says that according to the Respondent, pendency of the appeals is a reason enough to have this application refused. He asks the Court in determining this matter, to consider whether the fact of the pending appeals is a reason not to adopt the apposite Judgment and to have a decree issued.

13. In support of his application the applicant has raised nine points as follows:-

***i. Pendency of the Appeals cannot be a reason not to adopt the Judgment of the Water Appeal Board.***

***ii. It is now over 4 years since the Respondents filed the Appeals and yet they had done little to prepare the Appeals for directions and eventual hearing.***

***iii. One of the documents required in Records of Appeal pursuant to Order 4 2 Rule 13 (4) of the Civil Procedure Rules, 2010 is a copy of the order or decree and Judgment appealed from. The applicant argues that by opposing the adoption of the apposite judgment and the issuance of a decree they are making it difficult for the Record of Appeal to be completed and therefore delaying the appeal process. The Applicant submits that the decree is necessary not only for purposes of execution by the Applicant but also by the Respondents as part of the Record of Appeal in their respective Appeals.***

iv. **No order of stay of proceedings has been issued to stop the process of adoption.**

v. **No prejudice will be caused by the adoption of the judgment and issuance of the decree.**

vi. **The issue of the pendency of the appeals is not for this Court to-consider at this point. The Applicant laconically submits that this is a function of another Court.**

vii. **The Applicant opines that the Respondents are at liberty to apply for stay of execution in their Appeal case which applications will be argued and determined on their merits in Court entertaining the Appeals.**

viii **The Applicant is an old man and wishes to see this matter concluded without further delay.**

14. The 1st respondent, through its Advocates G.K.Kibira & Co., upon delivery of judgment by the Water Appeals Board, being aggrieved by it filed an appeal against the award on 27th March, 2013. It says that without bad faith on the part of the Respondent, the appeal has taken long to process.

15. The 1st Respondent contends that failure to proceed with the appeal for directions and eventual hearing is ascribable to the Court file getting lost. It says that the loss of the file should not be attributed to it.

16. The 1st Respondent says that it filed an application for stay of execution vide Notice of Motion dated 27th March, 2012 in Meru High Court Appeal No. 30 of 2012. It says that this application is before the Court and is yet to be determined.

17. The 1st Respondent tells the Court that it still maintains that the decision of the Water Appeal Board was wrong because the Board proceeded to determine issues of land ownership and trespass which issue fell outside its scope of jurisdiction.

18. The 1st Respondent refers the Court to the Case of BGM HC MISC APPEAL NO. 42 OF 2001 - JAMES WANGALWA & ANOTHER VERSUS AGNES NALIAKA CHESETO where it was stated:-

***“The right of appeal is a Constitutional Right that actualizes the right of access to justice, protection and benefit of the law, where essential substance encapsulates that the appeal should not be rendered nugatory, for anything that renders the appeal nugatory impinges on the very right of appeal”.***

19. The 1st Respondent laconically states that “ ***It is the obligation of the Court to preserve the subject of this suit which is inherent in the administration of Justice***”.

20. The 1st Respondent submits that the enforcement and adoption of the judgment apposite to this matter would defeat the purpose of preserving the subject of the relevant appeal, thereby occasioning extreme injustice.

21. Regarding the possibility of the Judgment being rendered nugatory should this application be allowed, the 1st Respondent says that the Judgment sum as per the decree is in the sum of Kshs. Two Million and Five Hundred Shillings, which it says is a colossal sum of money which the applicant may not be in a position to refund . It submits that the applicant's financial means are unknown “ ***as he is an old man and thus the chance of him not being able to refund the judgment amount in the event the intended appeal is successful are extremely high***”.

22. The 1st Respondent says that its appeal raises weighty matters and valid legal issues which question the judgment of the Water Appeal Board. It states that the appeal has a high probability of success and says that it is only just and fair that it be allowed to ventilate its appeal without the imminent risk of execution by the Applicant. It says that it will suffer substantial loss, damage or hardship if it pays the

decretal amount and the Applicant fails to refund the amount if the appeal succeeds.

23. The 1st Respondent submits as follows: “It is trite law and Rule of Practice that a Court decree must be complied with when there is no stay of execution and where stay of execution has been refused, specifically Order 22 Rule (1) (a) provides the decretal sum shall be paid into Court whose duty is to execute the decree. The 1st Respondent in this matter has filed a stay of execution of judgment which is pending before the Court and therefore this bars the execution of the judgment or a decree until the application for stay is determined”.

24. The 1st Respondent has referred the Court to the case of ***IN THE ESTATE OF HARUN THUNGU WAKABA VERSUS ATTORNEY GENERAL & ANOTHER [2015] eKLR – MISC. APPLICATION NO. 439 of 2014***, where Odunga, J, opined as follows:-

***“It ought to be remembered that this application is neither an application for setting aside a judgment or review and nor is it an appeal against a judgment. This application is meant to enforce the satisfaction of a Judgment. The fact that a Judgment may have been irregularly obtained does not bar this Court from enforcing its satisfaction as long as the same remains undisturbed . The respondent has not alleged that there is a pending appeal and even if there was one, that would not ipso facto preclude this Court from granting orders sought herein without a stay thereof having been sought and obtained”.***

25. The 1st Respondent submits that this case is an authority that if a stay of execution has been sought and is pending, the apposite Judgment cannot be enforced or executed. It reiterates that this is the scenario in this application.

26. The 1st Respondent submits that the applicant is well aware of the Respondent's Appeal in Meru HCCC Appeal No. 30 of 2012 and the stay of execution and should therefore have moved the Court for an early disposal of the apposite appeal.

27. The 1st Respondent says that it should not be made to suffer for circumstances beyond its control due to the failure of the Court to deliver the ruling in the application for stay of execution. It further submits that it is a legal entity capable of meeting conditions to be set for granting of stay of execution

28. The 2nd Respondent submits that the Applicant has not complied with the Water Appeal Board Rules which require that the decision of the Board be signed and sealed. It says that the decision exhibited by the applicant is neither sealed nor certified as a true copy of the original. It is submitted that this is the document to be used in ascertaining that the draft decree agrees with the decision. It submits that without the original record, this Court will be unable to tell what the decision of the Board was and if the draft decree agrees with the same.

29. I need not spend a lot of time in disposing of this submission. This matter was raised in Court on 15th March, 2016. Mr. Lutta for the applicant explained that he had attached copies of the Judgment and this being the case the embossed seal could not come out clearly. Mr. Gatari Ringera, for the 2nd Respondent, told the Court that he had seen a copy of the sealed Judgment. This issue rested there. The Submission is, therefore, not sustained.

30. The 2nd Respondent submits that being dissatisfied with the award made by the Water Appeal Board, it filed an appeal through ***HCCA NO. 31 OF 2012***. It states that the Appeal is yet to be heard and determined because the original record has not been delivered to the Appeal Court. It states that it is not to blame for the failure to have the file brought to Court. It says that it is eager to prosecute its appeal.

31. The 2nd Defendant submits that as the Applicant has stated in various affidavits in this matter that he is in dire need of funds, it is evident that if the funds sought by the applicant are released to him, they are unlikely to be recovered in the event that its appeal is successful. Should that be the case, it opines, the 2nd Respondent would be greatly prejudiced.

32. The 2nd Respondent urges the Court to consider the status of the 2nd Respondent under the County Government Act when determining this matter. I opine that this Submission is rather nebulous and the Court would have benefited from a better elaboration.

33. The 3rd Respondent opposes this application. It says that the Respondents filed separate appeals against the apposite award. It states that the three separate appeals could not be dealt with expediently, as handling them separately would be difficult and inconvenient. It says that this is why it filed an application for consolidation and Stay of Execution.

34. The 3rd Respondent goes on to say that the essence of Consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties. It says that consolidation is never meant to confer any undue advantage upon the party that seeks it and that nor is consolidation intended to occasion any disadvantage towards the party that opposes it. The 3rd Respondent proffers the case of *STUMBERG AND ANOTHER VERSUS POTGIETER [1970] EA 323* in support of its assertions. It quotes the Court as having held:-

***“Where there are common questions of law or fact in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matters should be disposed of at the same time Consolidation should be ordered”.***

35. The 3rd Respondent contends that if the applicant's application is allowed, it would defeat the purpose of the Respondents' appeal and the 3rd Respondent's application dated 02/07/2015, thereby causing extreme injustice. It argues that the Respondents' appeals would be rendered nugatory in spite of their overwhelming chances of success in view of its assertion that the Water Appeals Board acted without statutory jurisdiction in assessing and awarding damages.

36. It argues that in the event that the intended appeals were successful, the applicant who is of advanced age and whose financial means are unknown, would be unable to refund the Judgment amount of Kshs. 27,853,494 (Twenty Seven Million Eight Hundred and fifty Three Thousand, Four Hundred and Ninety Four Shillings. This according to the 3rd Respondent would render its appeal nugatory. For this reason it prays that this application be stayed pending hearing and determination of its application for Consolidation and stay of execution.

37. The 3rd Respondent concludes that this application is incompetent and has no legal basis and should, therefore, be stayed pending hearing and determination of the 3rd Respondent's application for consolidation and stay of execution and determination of its appeal. It opines that the applicant would not be prejudiced in any way as should the 3rd Respondent's appeal fail, he would be compensated by way of a monetary award.

38. The 3rd Respondent proffers the Court of Appeal case of *KENYA AIRPORTS AUTHORITY VERSUS MITU-BELL WELFARE SOCIETY AND ANOTHER [2014] e KLR* and the high court case of *JAMES WANGALWA AND ANOTHER VERSUS AGNES NALIKA CHESETON [2012] e KLR* where the 3rd Respondent asserts that it was held that for an appeal not to be rendered nugatory, it was necessary that orders of stay of execution be issued.

39. I have carefully considered the pleadings and submissions proffered by the parties in this matter. I have also considered the authorities submitted by the parties in support of their assertions.

40. There are some Common threads running through the Submissions filed by the three Respondents. They are:-

- i. ***They have filed appeals which have not been heard and determined which would be rendered nugatory should this application be allowed.***
- ii. ***The applicant is a person of advanced age and of unknown financial means and should this application be allowed, he will not be in a position to refund the judgment amount.***

iii. ***In their appeals, another common ground is that the Water Appeals Board lacked jurisdiction to deliver its judgment in the manner it did.***

41. I will first deal with the authorities proffered by the parties in support of their assertions. The applicant has submitted to Court as his authority the law governing the activities of the Water Appeal Board. He argues that the Board acted within its Jurisdiction in arriving at its decision which the respondents are challenging in their three appeals.

42. The 1st Respondent has proffered the case of BGM HC MISC APPEAL NO.42 OF 2001 -JAMES WANGALWA AND ANOTHER VERSUS AGNES NALIKA CHESETO (Supra). It cites that as its authority that “ ***It is the obligation of the Court to preserve the subject matter of the suit which is inherent in the administration of Justice***”. I opine that the assertion that it is a constitutional right of litigants to appeal is correct. However, no one case is exactly congruent to another in facts and circumstances. The Constitution protects the rights of all litigants, including the applicant herein.

43. The second authority proffered by the 1st Respondent is the case of **IN THE ESTATE OF HARUN THUNGU WAKABA VERSUS ATTORNEY GENERAL AND ANOTHER [2015] e KLR-MISC: CIVIL APPLICATION 439 OF 2014**. The 1st Respondent submits that “ the position in the case above emphasizes that if a stay of execution has been sought and is pending, the judgment earlier given cannot be enforced or executed which is the same scenario in the application before this court”.

44. I opine that this is a pellucid misrepresentation of what the Honourable Odunga, J, held. I quote him as having said. “ ***The Respondent has not alleged that there is a pending appeal and EVEN IF THERE WAS ONE, that would not ipso facto preclude this Court from granting the orders sought herein without a stay thereof having been sought and obtained.***”

It is clear that this authority tilts towards supporting the applicant's case. No stay has been obtained in this case. It is therefore not true as claimed by the 1st respondent that the apposite Judgment in this case cannot be enforced or executed.

45. The 2nd Respondent has not proffered any authorities in support of its assertions.

46. At the outset, I opine that the Case of STUMBERG AND ANOTHER VERSUS POTGIETER (supra) deals with consolidation of suits. It is good law in its circumstances. In this matter, however, I am not dealing with an application for consolidation.

47. The other authorities proffered by the 3rd Respondent are the Court of Appeal cases of **KENYA AIRPORTS AUTHORITY VERSUS MITU-BELL WELFARE SOCIETY AND ANOTHER (Supra) and the High Court case of JAMES WANGALWA AND ANOTHER VERSUS AGNES NALIKA CHESETO (Supra)**. They have been proffered for the assertion that “ ***for an appeal not to be rendered nugatory, it was necessary for orders of stay of execution to be issued.***” I opine that in this application I am not dealing with an application for stay of execution. For this reason, these authorities have doubtful relevance in the Circumstances of this matter. I stress that in litigation , no one shoe size fits all.

48. Regarding the assertion that this application should not succeed as there are pending appeals, I have looked at the apposite files. From the file, Civil Appeal No. 28 of 2012 seems to have been filed on 21/03/2012. No step was taken until 10/10/2014 when a mention date for directions was taken at the Registry. This was over 2 years after the intended appeal had been filed. Directions were taken on 06/11/2014. This clearly shows that the 3rd Respondent was not reasonably diligent in seeking to have its appeal heard and determined expeditiously.

49. The next time the 3rd Respondent came to Court was on 23/07/2015 with an application to have the 3 appeals filed by the Respondents consolidated and to have a stay of execution of the decision and award of the Water Appeals Board made on 02/3/2012. I opine that this application may have been intended to be a reaction to this application. And yet it was filed over 3 years after the Judgment the 3rd Respondent is challenging was delivered.

50. Civil Appeal Case No. 30 B of 2012 was filed on 28/03/2012 . From the records, the last time this matter was in Court was on 25/09/2012 when the parties were absent even though they were in Court on 04/07/2012 when this date was given by the Court. Since 25/09/2012, no step has been taken in this matter. Nothing better demonstrates the inaction by the appellant, the 1st Respondent herein, to have this appeal admitted and heard and determined expeditiously. This inaction renders this appeal a veritably apposite candidate for dismissal in terms of Order 17 of the Civil Procedure Rules. But this Court is not dealing with this issue in the present application.

51. Civil Appeal No. 31 of 2012 was filed on 29/03/2012. On 28/05/2012, Lutta and Company, Advocates, for the Respondent filed their notice of appointment as Advocates. Since then no step has been taken in this file. This is almost four and a half years ago.

52. I do find that even though the decision being challenged by the Respondent was delivered on 02/03/2012, over four and a half years ago, the Respondents have not obtained a stay of execution. The apposite judgment, therefore, remains undisturbed. The claim by the 1st Respondent, in his submissions at page 4, that there was a stay of execution, is therefore, misleading and untrue.

53. The 1st Respondent has told the Court at page 3 of its Submissions that failure to proceed with the appeal for directions and eventual hearing was due to the missing Court file. I opine that there is no evidence that the Court file had gone missing. Indeed, there is no correspondence complaining about a lost file.

54. The Submission by the Respondents that the applicant is a person of advanced age and of unknown financial means and therefore should not get the orders he seeks as he would not be in a position to refund the judgment amount, does not persuade me not to allow this application. Every one is equal before the law whether young or old. Age, ipso facto, cannot be used against a litigant. The financial status of a litigant cannot also in a deserving case be used to the disadvantage of a litigant.

55. I do not wish to delve into matters which the parties will have a chance to canvass in their appeals. I, however, note that the Respondents have not controverted or even elaborately canvassed, the applicant's claim that he is the registered owner of Land Parcel No. NTIMA/IGOKI/2032 which has spawned this application. The suggestion that he is a man of straw is, therefore, effectively controverted. This is one property that the Respondents, if they win their appeals, can fall back upon. Indeed the Respondents have invested many Millions of Shillings in the infrastructure they have constructed on this piece of land.

56. All the respondents have submitted that the Water Appeals Board lacked jurisdiction to deliver its judgment in the manner it deed. I hesitate to delve in details concerning a matter that has the possibility of being canvassed in the 3 appeals filed by the Respondents.

57. The Issue of Jurisdiction is over -arching. It is a serious issue. In the Court of Appeal case of “ THE MV LILIAN S”, [1989] KLR 1, Justice Nyarangi, JA, opined as follows:-

***“ I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.***

58. At page 8 of its judgment, it is clear that this issue was raised before the Water Appeal Board at the earliest moment. The Board states: “ For reasons given in details in our ruling on the Preliminary Objection we dismissed the Application and the Appeal proceeded to full hearing”.

59. Having considered the totality of the facts, pleadings and the Circumstances of this case, I am inclined to allow the application. There has been no stay of execution and, therefore, the apposite judgment remains undisturbed. I have not addressed some of the issues raised by the parties as these are pertinent

to the issues raised in the Respondents' three appeals.

60. In the Circumstances:-

*(1) The Judgment and/or decision of the Water Appeals Board in Appeal No. 3 (W.S) of 2008 in favour of the Appellant and the draft decree attached to this application are hereby adopted for execution and enforcement.*

*(2) Costs are awarded to the applicant against the Respondents.*

61. It is so ordered.

**DELIVERED AND SIGNED IN OPEN COURT AT MERU THIS 20TH DAY OF NOVEMBER, 2016 IN THE PRESENCE OF:**

CA: Daniel

Lutta for the Applicant

Kaimba for 3rd Respondent

Gatari Ringera for 2nd Respondent

Muriuki h/b G.K Kibera for 1st Respondent

**P. M NJOROGE**

**JUDGE**