



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC APPEAL 37 OF 2019**

**KIAO WATER PROJECT (Sued through IBRAHIM BAARIU**

**(Chairman), MIRITI M'IKENDA (Secretary) and JOSPHAT KIRIINYA (Treasurer)**

***VERSUS***

**JOSEPH MUKARIA MUNGANIA.....1<sup>ST</sup> RESPONDENT**

**JULIUS GITHINJI MURACHIA.....2<sup>ND</sup> RESPONDENT**

1. The notice of motion dated 16<sup>th</sup> May 2019 is seeking the following orders:

(i) Spent.

(ii) That this honourable court be pleased to issue an order of stay of execution restraining the execution of the judgment and decree in Maua CMCC No. 295 of 2015 and all subsequent/consequential orders thereto pending the hearing and determination of this application.

(iii) That this honourable court be pleased to issue an order of stay of execution restraining the execution of the judgment and decree in Maua CMCC 295 of 2015 and all subsequent/consequential orders thereto pending the hearing and determination of Meru High court ELC appeal No. 37 of 2019.

(iv) That the costs of this application be provided for.

2. The grounds in support of this application are that:

i) The judgment was delivered by Honourable J. Wang'ang'a in Maua CMCC 295 of 2015 on 21.1.2019 in favour of the respondents.

ii) Being dissatisfied with the said judgment, the applicant/appellant appealed to the environment and land court of Kenya at Meru being ELC appeal No. 37 of 2019.

iii) The said appeal is arguable and has overwhelming chance of success as it raises the issue of jurisdiction.

iv) The respondents were in the process of executing the judgment and decree in Maua CMCC 295 of 2015.

v) The applicant's water pipes and water supply to its members risk being unlawfully tampered with should the respondent's execute the judgment delivered on 21.1.2019.

vi) The respondents have threatened to poison water and/or forcefully disconnect water supply to the respondent's members.

vii) Anarchy may result should the respondents execute the judgment dated 21.1.2019 as they are violent and arrogant persons who never cooperate with other members.

viii) The applicant's constitution and bylaws stand to be unjustifiably violated should the respondents execute the judgment delivered on 21.1.2019

ix) The application has been brought without undue delay.

x) Unless this application is granted, the applicants stand to suffer irreparable loss and damage and/or substantial loss.

xi) It is in the interest of justice and fairness that this application be allowed.

3. The chairman who is amongst the applicants, Ibrahim Baariu has sworn a supporting affidavit where in addition to the grounds set out in the application, he has averred that ;

4. The respondents by themselves and/ or their agents had maliciously caused damages to the defendants water supply and had vandalized the applicants water pipes which matter had been reported at Maua police station and booked vide OB 35/15/03/19 a police order to arrest was issued and the matter is pending investigations.

5. The applicant also avers that the respondents have threatened to forcefully disconnect other members from supply and use of the water and further threatened to poison the water supply should the disconnection fail and that the applicants members' pipes risk being unlawfully tampered with should the plaintiffs execute the judgment delivered on 21/1/2019 and which execution poses threat both to members life's and security.

6. The chairman also stated that the application has been brought without undue delay and that unless the application is granted they stand to suffer irreparable loss and substantial loss and it is in interest of justice and fairness that the application ought to be allowed.

7. Application is opposed through the replying affidavit of Joseph Mukaria Mungania was the 1<sup>st</sup> plaintiff in the lower court case. He avers that; the suit here in and that he had read and understood the notice of motion dated 14<sup>th</sup> May 2019 and his advocates on record had explained to him the impact and the subject matter.

8. The respondent had filed a similar application which was rejected by the trial court, and that applicant was not candid and had not disclosed this information to this court.

9. He is a law abiding citizen and has no intention of taking the law into his own hands, that the respondents have suffered untold suffering due to the unlawful disconnection of water which was an act of the applicant and that the appeal had no chances of success.

10. The respondent also deponed that despite the suffering they were going through the applicant had not shown what substantial loss they will suffer if it connects the water and the respondents start paying for it.

11. The respondent also submitted that the applicant had not undertaken to pay security for the loss the respondents would suffer and that the applicants will not suffer any loss at all since the applicants were the ones to do the connection of the water and still receive the payments.

12. He also averred that the allegations by the applicant of loss, waste and damage were made up to misdirect the court on what was to be done on the ground. He also denied the allegations by the applicants that they had attempted to connect the water on their own.

13. The respondent further argued that the application by the respondents should be rejected since it was based on lies and malice against them (respondents). He also stated that water is a God given necessity and that the applicants should not be empowered to deny them water since they were ready and willing to pay for the same and also added that the issue was a matter of life and death and that the court should allow them to use the same pending hearing of the appeal.

14. It was submitted for the applicant that they have a good appeal. It is averred that the magistrate who heard the case was not gazetted and had no jurisdiction to determine the matter. It is further contended that the two respondents had filed the Maua case on 9<sup>th</sup> December 2015 where they had sought permanent injunction and by then their water had already been disconnected. By then, the water disconnection for the 2<sup>nd</sup> respondent had taken place in year 2009, and hence, 11 years have gone by since the time of disconnection. As for the other respondent his water has remained disconnected for a period of 6 years.

15. It was also submitted for the applicant that the 2 respondents had threatened to poison the water, a serious allegation which had been reported to the police. Such a threat amounts to a threat to right to life.

16. For the respondent it has been submitted that the alleged threat to poison the water remains a mere allegation. It is also averred that the respondents stands to suffer untold harm due to the water disconnection.

17. I have weighed all the arguments raised here and I have also considered the submissions proffered by the parties.

18. Firstly, I find that the averment made by the applicants that the two respondents have not enjoyed the services of the appellant for a period of over 6 years in terms of water services have not been challenged.

19. I have also seen that in paragraph 7 and 8 of the affidavit of Ibrahim Baariu, very serious allegations have been made against the respondents. Applicants have availed particulars of the police Occurrence Book numbers (commonly referred to as OB NO.) regarding the reports made to the police. I cannot take such allegations lightly. I have also taken into account that the two respondents have not been getting their water needs from the applicant.

20. Section 42 (6) of the civil procedure act provides that:

**“(2) No order for stay of execution shall be made under subrule (1) unless— (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”**

21. A Court of law has discretion to issue an Order for stay of execution but the said discretion must be exercised judicially. In **Canvass Manufacturers Ltd Vs Stephen Reuben Karunditu, Civil Application No.158 of 1994, (1994) LLR 4853.** the Court held that:-

**“In Conditions for grant of stay of execution pending appeal, arguable appeal and whether the appeal would be rendered nugatory, the discretion must be judicially exercised”.**

22. Further in the case of **Stephen Wanjohi...Vs...Central Glass Industries Ltd, Nairobi HCC No.6726 of 1991.** the Court held that:-

**“For the court to order a stay of execution there must be:-**

**i. Sufficient cause**

**ii. Substantial loss**

**iii. No unreasonable delay**

**iv. Security and the grant of stay is discretionary”.**

23. I find that the applicant has established that there is sufficient cause to warrant the issuance of the orders sought for. There is some delay in the filing of this application but the same is not inordinate. I have also taken into account that the applicant is ready to offer security in this case.

24. Final orders: I find that the application is merited and I proceed to grant orders as follows:

**(1) An order of stay of execution is hereby issued restraining the execution in judgment and decree in Maua CMCC No. 295 of 2015 and all subsequent/consequential orders pending the hearing and determination of the appeal.**

**(2) The applicant is to deposit a sum of Kshs.70,000 in court as security for costs within 30 days from the date of delivery of this ruling failure to which the order of stay shall lapse.**

**(3) The stay granted hearing is to last for a period of 1 year.**

**(4) The costs of this application shall abide the outcome of the appeal.**

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 31<sup>ST</sup> DAY OF JULY, 2019 IN THE PRESENCE OF:-**

C/A: Ndonye

Gikonyo for appellant/applicant

Muchiri for respondent

Appellant

Respondents

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**