



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPLICATION NO. 135 OF 2010**

**ATHI WATER SERVICES BOARD.....APPLICANT**

**AND**

**NAIROBI CITY WATER & SEWERAGE COMPANY.....RESPONDENT**

***(An application for a stay of the orders of the High Court pending the lodging, hearing and determination of an intended appeal from the order of the High Court of Kenya at Nairobi ( Gacheche, J) dated 25<sup>th</sup> May 2010***

**in**

**H.C. MISC. APPL. NO. 195 OF 2010)**

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**RULING OF THE COURT**

This is an application brought under rule 5 (2) (b) of this Court Rules for orders that pending the lodging, hearing and determination of the applicant's (*ATHI WATER SERVICES BOARD*) intended appeal, there be a stay of execution of the orders granted by the superior Court (*Lady Justice Gacheche J.*) on 25<sup>th</sup> May 2010 and that pending the lodging, hearing and determination of the intended appeal there be a stay of proceedings of the orders granted by the superior Court in High Court Miscellaneous Application No 195 of 2010.

The application is grounded upon the fact that unless the application is heard urgently, the respondent was likely to enforce the order it obtained irregularly and in blatant abuse of the Court process thereby rendering the intended appeal nugatory and occasioning unquantifiable loss and prejudice to the applicant and the general public. The applicant submits that the intended appeal is arguable with good prospects of success because the learned Judge erred in law in proceeding with the hearing of an *ex parte* application for grant of leave to institute judicial review without the applicant filing and giving the mandatory notice to the Registrar and that the learned Judge erred in issuing an order in the nature of a mandatory injunction under the guise of a stay order contemplated by order LIII of the Civil Procedure Rules.

It is also submitted that the learned Judge erred in law in granting the respondent leave to commence judicial review proceedings yet the respondent lacked the requisite *locus standi* to institute the suit and that the learned Judge erred in fact by failing to consider the fact that the subject matter of the judicial review application was a contract of employment and therefore in the ambit of private law whose

remedies were available to the respondent's employees to pursue.

The applicant urges the intended appeal will be rendered nugatory if a stay is not granted because if the order sought to be appealed against is enforced, the respondent's named employees will have irregularly served as the respondent's managing and financial directors. The applicant also complains that its application to have the orders of the learned Judge stayed and or vacated, was not certified urgent but fixed to be heard on 18<sup>th</sup> November 2010, yet the judicial review application was set to be heard on 12<sup>th</sup> October 2010.

The learned Judge on 25<sup>th</sup> May 2010, while granting leave to apply for the order of certiorari to quash the applicant's decision contained in two letters dated 19<sup>th</sup> May 2010, dispensed with the filing and giving of a notice of the application to the Registrar which an applicant for judicial review is enjoined to file by rule 1 (3) of Order LIII of the Civil Procedure Rules. The learned Judge also granted leave to the present respondent to apply for an order of prohibition to prohibit two other named persons to act as managing and financial directors respectively of the respondent and leave was also granted to apply for an order of prohibition to prohibit Eng. Philip Gichuki from initiating negotiations between the applicant and the respondent to put in place a new Service Agreement.

The grant of such leave was ordered to operate as a stay of the decision contained in the applicant's two letters both dated 19<sup>th</sup> May 2010 sending two of the respondent's employees on compulsory leave and appointing temporary replacements in their place. It is submitted that the appeal is arguable as the subject matter of the judicial review application was a contract of employment and therefore in the ambit of private law as opposed to public law and therefore neither subject nor amenable to Judicial Review. The retrospective order of stay granted by the superior court purports to stay what has already been administratively effected, as the relevant government Ministries and stakeholders in the water sector unanimously decided to send the respondent's employees on compulsory leave with immediate effect. The order amounts to reinstatement of the said employees who were asked to step aside while investigations into embezzlement of funds and massive corruption was ongoing.

The respondent (Nairobi City Water and Sewerage Company Ltd) on its part filed a replying affidavit in opposition to the application confirming firstly that an order for leave to commence contempt proceedings against the applicant's specified officers was granted by the superior Court on 31<sup>st</sup> May 2010. It is submitted that the applicant's application does not demonstrate there are any arguable points which would be rendered nugatory if no stay were granted. However the respondent concedes that there might be one such arguable point with respect to the superior Court order which dispensed with the requirement for giving of a notice of the application for leave to the Registrar. Mr. Macharia, learned counsel, for the respondent submitted that the appeal would not be rendered nugatory if no stay was granted because contrary to the submissions by the applicant, there would not be a water crisis in Nairobi. He also submitted that it is trite law that court orders must be obeyed and relies on this Court decision in the case of COUNTY COUNCIL OF NAROK VS KALYASOI FARMERS CO-OPERATIVE SOCIETY AND 6 OTHERS -Civil Application No 166 of 2005(unreported). This Court in that case also observed that no two cases present the same set of circumstances:-

*“The way we see this matter is that the order of Ojwang, J. directed that the application for contempt would be heard before the issue of jurisdiction. There may be merit in the submission that the issue of jurisdiction should always be determined before any other matter since jurisdiction is crucial to any subsequent orders that a court may issue. But each case must be considered on its own peculiar circumstances.”*

While we appreciate what was also stated in that case that it is the dignity and authority of the court which is always in question in an application for contempt of court, we see that each case has to be considered on its own facts and circumstances. Our attention has in the instant application been drawn to a possible misapprehension by the learned Judge of the principles upon which the jurisdiction of judicial review may be invoked. Our attention was drawn in this respect to this Court's majority decision in the case of Kenya POWER AND LIGHTING COMPANY LIMITED VS NGM COMPANY LIMITED & TWO

OTHERS- Civil Application No 135 of 2010 (unreported) in which Githinji, JA stated:-

*“It is further doubtful that the contract signed between KPLC, a body corporate and the second interested party can be a proper subject of judicial review and whether such contract and subsequent sub-contracts can be rescinded or implementation thereof suspended through judicial review jurisdiction.*

*Lastly, it is trite law that a “stay” does not reverse, annul, undo or suspend what has already been done- see KILELESHWA SERVICE STATION LTD VS KENYA SHELL LTD- Civil Application No. NAI 84 of 2008 (unreported)”*

We are, however, alive to the fact that the time to express conclusive views on any matter in an application such as this is not at this stage, but at the hearing of the intended appeal. What an intending appellant is required to demonstrate at this juncture is an arguable appeal which means one which is not frivolous. This was aptly put by this Court in the case of SILVERSTEIN VS. CHESONI [2002]1 E A 296:-

*“An applicant seeking a stay under rule 5 (2) (b) of the Court’s Rules has to satisfy the Court that his intended appeal was arguable, that is, that the intended appeal was not frivolous, and that unless the order of stay were granted, the intended appeal if successful, would be rendered nugatory. Both requirements have to be proved.”*

We are satisfied that the applicant has put forth an arguable appeal and which is not frivolous. The applicant submits that if no stay is granted the respondent is likely to enforce orders which it has obtained irregularly and in blatant abuse of the Court process. That means the respondent’s named employees will have irregularly served as the respondent’s managing and financial directors respectively. The applicant also fears that if no stay is forthcoming, there is likely to be disruption of water supply to the City of Nairobi.

We therefore see that the applicant has shown the intended appeal would be rendered nugatory if no stay is granted and accordingly we grant a stay of execution of the orders of the superior court issued on 25<sup>th</sup> May 2010 pending the filing and determination of the intended appeal. We also grant a stay of proceedings in relation to High Court Miscellaneous application No 195 of 2010 pending the determination of the intended appeal and order that the costs of this application be in the intended appeal.

DATED and DELIVERED at MOMBASA this 30th day of July, 2010.

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**M. OLE KEIWUA**

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**JUDGE OF APPEAL**

**E.M. GITHINJI**

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**JUDGE OF APPEAL**