



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 1931 OF 2013**

(Before Hon. Justice Hellen S. Wasilwa on 7<sup>th</sup> March, 2018)

SOLOMON GITHAE IRUNGU.....CLAIMANT

-VERSUS-

NAIROBI CITY WATER AND

SEWERAGE COMPANY LIMITED.....RESPONDENT

**RULING**

1. The Application before Court is one dated 14.11.2017 brought under Order 42 Rule 6 Civil Procedure Rules, Section 12 of the Industrial Court Act, Section 3A Civil Procedure Act and all enabling provisions of the law seeking orders that:

*a. The Application be certified as urgent and service be dispensed with in the first instance.*

*b. The Honourable Court be pleased to order pending inter partes hearing and disposal of the application dated 8<sup>th</sup> February, 2017, the Claimant and his agents be restrained by a order of this Court either by himself, servant/agents or auctioneers from attaching the Respondent's property in execution of the decree arising from the Judgment of Honorable Mr. Justice Nderi dated 2<sup>nd</sup> December, 2016.*

*c. The Honorable Court be pleased to order stay of execution of the decree arising from the judgment pending the determination of the application inter partes and determination thereof.*

*d. This Honourable court be pleased to order the reinstatement and/or extension of the order for stay of execution of the decree arising from the Judgment aforesaid pending the hearing and determination of the Respondent's appeal.*

*e. Costs of this application be in the cause.*

2. The Application is premised on the grounds that:

*1. The Respondent's application dated 8<sup>th</sup> February, 2017, came up for mention on 7<sup>th</sup> November, 2017, seeking directions on disposal and was stood over generally for no appearance by the Respondents.*

*2. The Counsel for the Respondent was in another Court at Embu attending Election Petition Number 2 of 2016 and had requested another Counsel to attend and hold brief to request for directions on the application and the Advocate did not attend.*

*3. The Claimant has issued the respondent with a proclamation and attachment dated 9.11.2017, in execution of the Decree arising from the Judgment of Honorable Mr. Justice Nderi dated 2.12.2017, thus the Respondent faces a real risk of its assets being attached.*

*4. The proclamation has been issued in error as there exists and still in force, stay Orders that were issued on 9.2.2017.*

*5. The Respondent complied with conditions of stay of execution order that were conditional on the respondent depositing with the Court a sum of Shs. 778,520 and pays a sum of Shs. 562,548.88 to the Claimant within 14 days from 2.12.2016. The Respondent has already filed a Notice of Appeal.*

**6. The Respondent has an application dated 8.2.2017, pending disposal before the Honourable Court through which the interim stay order are pegged pending final determination.**

**7. The Respondent shall suffer great loss unless the Application is heard with utmost urgency.**

**8. The execution of the decree will involve the payment of the decretal amount to the claimant and in the event the Respondent's appeal succeeds the Respondent will be greatly prejudiced and the Appeal rendered nugatory.**

**9. In the premise, it is only fair and in the interest of justice that he said application be heard expeditiously and the orders sought granted.**

3. The Application is supported by the Affidavit of one Assumpta M. Reuben the acting Legal Coordinator for the Respondent who reiterates the grounds on the face of the Application.

4. The Claimant has opposed the Application by filing a replying affidavit wherein he avers that his Advocates were served with a Notice of Appeal and Draft Memorandum of Appeal on the 8.7.2016 which the Applicant used to procure stay orders on 2.12.2016 and to date the Appeal, is yet to be prosecuted.

5. He further avers that the failure by the Respondent to file their Appeal to date amounts to unreasonable delay and that the instant application is an abuse of Court process and an attempt to deny the Claimant the fruits of the judgment.

6. The Claimant/Respondent avers that the Respondent/Applicant does not have good grounds of appeal and only seeks to delay the proceedings with a view to defeating the course of justice amounting to an abuse of Court process. He prays for the Application to be dismissed with costs.

7. The Claimant opted not file any submissions but the Respondent filed submissions wherein they state that they have complied with the conditions of stay set out in Order 42 Rule 6(4) of the Civil Procedure Rules 2010 and if the Orders sought are not granted the Appeal shall be rendered nugatory.

8. The Respondent also submit that they stand to suffer irreparable damage if the Orders sought are not granted as the Claimant's assets are unknown. They pray for the Application to be allowed as drawn.

9. I have considered submissions of both parties. The orders sought are orders of stay. On 2/12/2016, the Hon. Justice Nderi Nduma allowed an application for stay on condition that the amount of 978,520/= was to be deposited in Court within 14 days failure of execution was to proceed and as orders of stay were to lapse automatically. The Respondent managed to deposit Kshs.778,520/= as ordered but later in December 2016.

10. The Applicants aver that having deposited the cash in Court, they met the conditions of stay and the execution being undertaken by the Claimants should not be allowed to continue.

11. The Applicants contend that they have filed an appeal which will be rendered nugatory unless the stay is allowed.

12. The Respondents argue that though the stay was granted pending appeal, the Respondents have never prosecuted their appeal which they file don 8<sup>th</sup> July 2016. The Claimants argue that this application is therefore an abuse of the Court process.

13. I have considered the averments. The Applicants have not demonstrated to Court why they have not presented their appeal for over 1 year. Their only argument is that the appeal is pending at the Court of Appeal.

14. Since there is no indication that the delay in the prosecution of the Appeal has been occasioned by the Applicant and given that the decretal sum has partly been deposited in Court, the Claimant does not stand to suffer irreparable harm. If the Application is on the other hand disallowed, the Applicant's appeal stand to be rendered nugatory. In the circumstances I allow stay orders pending hearing and disposal of the appeal currently pending before Court of Appeal.

15. Costs to abide the outcome of the appeal.

**Dated and delivered in open Court this 7<sup>th</sup> day of March, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Miss Arito holding brief for Nyamweya for Applicant/Respondent – Present

Respondent Claimants – Absent