



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NAIROBI**

**SUIT NO. 135 OF 2015**

**GEORGE KALEVE MUSYOKI.....CLAIMANT**

**VERSUS**

**NOL TURESH LOITOKITOK WATER SANITATION CO. LTD....RESPONDENT**

**RULING**

1. The application before me is the Respondent's notice of motion application dated 2<sup>nd</sup> February 2018 and filed on 5<sup>th</sup> February 2018. Through it, the Respondent is seeking in the main authority of the firm of Anthony M. Mulekyo Advocates to come on record for the Respondent, a stay of execution of the warrants of attachment issued on 16<sup>th</sup> January 2018 and an order that the Respondent liquidates the decretal amount by monthly instalments of Kshs. 50,000/- until payment in full. The grounds of the motion were chiefly that the Respondent is unable to fully settle the decretal sum by deposit of the sum in a joint interest bearing account and that the Respondent if not granted the stay will be unable to provide water and sewerage services to its clientele which would be denying the populace a right to clean water contrary to Article 43(d) of the Constitution further reiterated under Section 65 of the Water Act. The Respondent denied giving instruction to its former advocates to enter into a consent on the deposit of the decretal sum.

2. The Claimant is opposed and filed a replying affidavit on 13<sup>th</sup> March 2018. In his affidavit he states that the Respondent has failed to pay his salary arrears and the decretal sum as ordered by the court on 24<sup>th</sup> June 2016. The Claimant asserts that the Respondent ignored the judgment of the court in as far as the sums were concerned having reinstated him to employment on 1<sup>st</sup> July 2016. The Claimant deponed that the Respondent had to demonstrate the intended appeal would be rendered nugatory and that there is an arguable appeal and that failure to do so meant there was no basis for the grant of stay. The Claimant states that the payment of Kshs. 50,000/- a month is too little too late and urges the court to dismiss the stay application with costs.

3. The parties relied on the documents filed and sought the determination of the court on the issues on the motion. In order to benefit from a stay of execution, the applicant must demonstrate a few things. In **Halai & Another v Thornton & Turpin (1963) Ltd [1990] KLR 365** the Court of Appeal held as follows:

*The High Court's discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly the Applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant stay and thirdly the Applicant must furnish security. The application must of course be made without unreasonable delay.*

4. The Respondent seeks the grant of the relief of a stay of execution. It has come hot on the heels of an attempt to execute the decretal sum. The Respondent has not set out the grounds of the intended appeal which in any event is time barred as the notice of appeal was filed on 5<sup>th</sup> July 2016. Nevertheless, the Respondent seeks the discretion of the court to be exercised in its favour. The Respondent has to establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant stay and thirdly the Applicant must furnish security. The application must of course be made without unreasonable delay. The court is not satisfied that substantial loss would ensue from a refusal to grant a stay of execution as there is no evidence that payment of a sum of Kenya shillings 2 million or thereabout would impair the provision of water and sewerage services to the people who are served by the Respondent. No security for the performance of the decree is issued save for the offer to settle the decretal sum by payment of Kshs. 50,000/- monthly till payment in full. The principles on payment by installment enunciated in the case of **Jabali Alidina v Lentura Alidina [1961] EA 565** still hold. The court held at page 566 of the decision that:-

*All commentators on the Civil Procedure Code agree that the court's discretion to order payment of the decretal amount in installments is one which must be exercised in a judicial and not an arbitrary manner. The onus is on the Applicant to show that he is entitled to indulgence under this rule. It is for the Applicant to show "sufficient reason" for indulgence being shown to him, and this court is immediately faced with difficulty in this respect, as the learned magistrate has not stated what reasons put forward by the Applicant he considered sufficient to justify the exercise of the court's discretion in the Applicant's favour.*

5. The Respondent had the onus to demonstrate there is sufficient reason for this indulgence being extended. Since the reinstatement, the Respondent has not made any effort to settle the decretal sum. If there was intent to pay, that would have been a starting point. The Respondent cannot be heard to assert that it was unaware of the determination of the court made in June 2016 as there was part compliance of the judgment in July 2016. From the foregoing, it is clear the motion is not fit for grant. I dismiss the Respondent's notice of motion application dated 2<sup>nd</sup> February 2018 and filed in court on 5<sup>th</sup> February 2018 with costs to the Claimant and order that execution should proceed.

It is so ordered.

**Dated and delivered at Nyeri this 28<sup>th</sup> day of May 2018**

**Nzioki wa Makau**

**JUDGE**