



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**  
**AT NAIROBI**  
**CAUSE NO. 835 OF 2013**

**KENYA UNION OF COMMERCIAL FOOD AND**

**ALLIED WORKERS .....CLAIMANT**

**VERUS**

**NOL TURESH LOITOKITOK WATER**

**AND SANITATION CO. LIMITED.....1<sup>ST</sup> RESPONDENT**

**AND**

**TANATHI WATER SERVICES BOARD.....2<sup>ND</sup> RESPONDENT**

**Mr. Agwenyi for the 2<sup>nd</sup> Respondent / Applicant**

**Mr. Dickens Atela for the Claimant / Respondent**

**RULING**

The 2<sup>nd</sup> Respondent / Applicant, Tanathi Water Services Board, seeks an Order of the Court for stay of execution of the ruling and/or Order of 26<sup>th</sup> November, 2013 and all consequential Orders emanating therefrom pending the hearing and final determination of the intended appeal lodged by the Applicant on such terms as to furnishing security as the Honourable Court may in its discretion deem fit.

The Application is based on grounds set out in the Notice of Motion to wit;

- a. That the Applicant filed an application dated 16<sup>th</sup> September, 2013 seeking leave from this Honourable Court to set aside the exparte Proceedings, Ruling and Order issued on 20<sup>th</sup> June, 2013.
- b. That this Honourable Court on 26<sup>th</sup> November, 2013 dismissed the said Application with cost.
- c. That the Applicant being aggrieved by the said Order of 26<sup>th</sup> November 2013, has lodged an

Appeal to the Court of Appeal.

The Notice of Appeal dated 5<sup>th</sup> December, 2013 is attached to the Application together with a draft memorandum of Appeal.

The nub of the Appeal is that the court *aquo* erred in finding that the two Respondents were jointly and severally liable to pay the salaries of the members of the Claimant Union when the Respondent Nol Turesh Loitoktok Water and Sanitation Co. Ltd. should have been held solely liable to pay the balances.

That the Judge erred in summarily dismissing the Applicant's Notice of Motion application dated 16<sup>th</sup> July, 2013 that had sought for stay of execution of this ruling and Order of 20<sup>th</sup> June, 2013.

The Respondent Union filed a Notice of Preliminary Objection on 23<sup>rd</sup> January, 2014 the gist of which is that;

The Court has already determined the issue of stay of execution when on 26<sup>th</sup> November, 2013, it dismissed the Applicant's application made on 16<sup>th</sup> June 2013 and 4<sup>th</sup> September 2013 respectively.

The Court could thus not be asked to revisit this issue which is now resjudicata.

In the matter of **Reliance Bank limited Vs. Norlake Investments Limited, Court of Appeal of Kenya Case No. 937/02 I EA at 227.**

Omolo, Bosire and Owuor JJA stated:

*“Hitherto, this Court has consistently maintained that for an application under Rule 5(2) (b) to succeed, the applicant must satisfy the Court on two matters, namely:*

*“1 that the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal, and*

*2 that if an order of stay or injunction as the case may be, is not granted, the appeal, or the intended appeal were it to eventually succeed would have been rendered nugatory by the refusal to grant the stay of the injunction.”*

In the present case, the Applicant wishes to extricate itself from the 1<sup>st</sup> Respondent and by so doing avoid payment of the award of Court issued against the two jointly and severally.

The ruling of the Court dated 20<sup>th</sup> June, 2013 was made pursuant to an *ex parte* hearing of a notice of motion dated 25<sup>th</sup> May 2013 and filed on 4<sup>th</sup> June 2013.

The Court had found the Claimant/Respondent and the 1<sup>st</sup> Respondent in that application had been properly served but had failed to file a replying Affidavit. A return of service dated 13<sup>th</sup> June 2013 was filed in Court on 18<sup>th</sup> June 2013, and the Court was satisfied that proper service of the Notice of motion was done.

A hearing notice dated 4<sup>th</sup> June 2013 setting the matter for hearing on 20<sup>th</sup> June, 2013 had also been served on both Respondents.

The Court has already refused to grant a stay of execution pending a review application hitherto filed by the present applicant.

The Court is now being asked to reconsider its earlier decision now that a notice of appeal has been lodged.

Firstly no material has been placed before Court to extricate the Applicant from the matter before Court, it being a Licensor of the 1<sup>st</sup> Respondent in terms of *Section 53 and 55 of the Water Act, 2002*.

After all, in Cause No. 1613 of 2013, the Applicant and 1<sup>st</sup> Respondent were sued jointly and the Applicant did not contest the outcome of those proceedings. Nothing has been placed before the Court, to exercise its discretion otherwise in this matter.

The Court is of the view that the noted Appeal is not arguable and is only meant to delay the payment of salaries to the employees of the Applicant and the 1<sup>st</sup> Respondent who continue to serve the two bodies jointly and have not been paid their lawful remuneration for well over a year to date.

Furthermore, the two agencies serve the public on behalf of the Government of Kenya and it is inconceivable that, the 2<sup>nd</sup> Respondent would suffer irreparable harm by paying the salaries of employees without whom it would not be able to discharge its services and/or statutory mandate.

In short, the intended appeal would not be rendered nugatory by the failure by this Court to grant a stay of execution. The two entities share an umbilical cord through which amends would be possible were the appeal to succeed.

Accordingly, the Application is dismissed with costs payable to the Respondent Union.

***Dated and Delivered at Nairobi this 28th day of February, 2014.***

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**