



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL SUIT NO.2 OF 2019

KENYA UNION OF WATER AND SEWAGE EMPLOYEES.....1ST PLAINTIFF

ERICK NASOKHO.....2ND PLAINTIFF

MARK WERUNGA.....3RD PLAINTIFF

VERSUS

NZOIA WATER AND SEWAGE COMPANY LTD.....1ST DEFENDANT

WATER SERVICE REGULATORY BOARD.....2ND DEFENDANT

RULING

By way of plaint dated 20.2.2019 the Plaintiff/Applicant filed this suit against the Respondent seeking the following prayers:

- i. Declaration that the board of the 1st Defendant is illegally constituted pursuant to the provisions of Article 66 of the Articles and Memorandum of Association.***
- ii. Declaration that the intended recruitment of the Managing Director in its present form is equally illegal.***
- iii. An order that the current board be disbanded and be properly constituted.***

Simultaneously to the plaint the Plaintiff/Applicant filed a Notice of Motion application dated on the even date seeking the following prayers;

- i. That the present application be and is hereby certified urgent and be heard exparte in the 1st instance.***
- ii. That pending the hearing of this application interpartes an order of temporary injunction does issue restraining the 1st Respondent's Directors from recruiting and/or conducting interviews for recruitment of the Managing Director on 28.2.2019 or on any other day.***
- iii. That pending the hearing and final determination of this suit an order of temporary injunction does issue restraining the 1st Respondent's Directors from recruiting and/or conducting interviews for the recruitment of the Managing Director on 28.2.2019 or on any other day.***
- iv. That the costs of this application be provided for.***

Respondents were served with the application and they filed Notice of Preliminary Objection stating that;

- i. The Plaintiff/Applicant suit/application is defective, a non-starter frivolous and abuse of court process.***
- ii. The Plaintiff/Applicants lacks locus standi to pursue the claim***
- iii. This Honorable Court lacks jurisdiction to entertain this suit/application.***
- iv. Misjoinder of parties.***

By order dated 25/2/2019 this court directed that the P.O. be heard and canvassed by way of written submission and both parties filed their respective submission.

Mr. Mogaka for the respondent briefly submitted that on suit being frivolous and *locus standi* on ground that a trade union mandate is to regulate relations between employees and employers and the supporting affidavit does not indicate whether the suit is a representative suit brought on behalf of the employees and it is their submission that the 1st Plaintiff are not either 1st plaintiff's General Secretary and no evidence on record that they are the elected representatives of the members in a work place and wits such glaring non-compliance with the law the plaintiffs are undeserving of the orders sought in the application.

On recruitment of the managing director and composition of the Board of Director Mr. Mogaka submitted that a party must have the requisite legal right, capacity and authority to move the court without which the suit collapses. He submits the plaintiff lacks requisite legal authority to pursue the claim and that the plaintiff has not established the cause of action against the 1st Defendant. He further submitted on jurisdiction that this court lacks requisite authority to hear and determine this suit under Article 23 and 162(2) of the Constitution of Kenya 2010. He finally submitted that if orders sought are granted the effect of the orders will be to paralyze the operation of the 1st Defendant.

Mr. Namasaka submitted on behalf of the Plaintiff/Applicant that the P.O. raised is on law and requires evidence to be adduced to evaluate the court to reach at a final decision. He submitted that article 66 of the article and Memorandum of Association was not complied with that provided composition of the board and procedure of appointment that require the company to involve the public through public participation in the appointment of directors. On jurisdiction he submitted that this court has jurisdiction to hear and determine the matter as the suit purely relates to interpretation of the Article and Memorandum of association and stated supporting authority on the same. He submitted this court has mandate and authority under Article 165(3) and Companies Act to deal with this matter.

From the above, the pleadings, the application, the affidavits and the submissions of the parties filed herein, I am in a position to decipher the major issues for determination is;

- i. Whether the Plaintiff/Applicant has *Locus standi*?
- ii. Whether this court has jurisdiction to hear this matter?

To determine the issue one it my considered view that the Plaintiff/Applicant has *locus standi* to file this suit because the issue they are raising is whether the company board id properly constituted as per articles 66(1) and 66(2) and stakeholder public participation procedure as per article 66(4) of the article of association of 1st Respondent.

On issue two on whether this court has jurisdiction looking at the orders sought under the application this is not a matter between employer and employees it is a matter that relates to on governance on whether the board is properly constituted according to its Article and Memorandum of Association and this is an issue that can be decided by the high court because the legality of a board is an issue which High Court has jurisdiction. This suit does not fall within the confines of the provisions of section 12 of the Employment and Labour Relations Court Act 2011(as amended) as read with Article 162(2) of the constitution. This in my view is a dispute involving the interpretation of Articles and memorandum of the 1st Respondent and composition of the present board

On the application it is noted that the interviews for appointment of Managing Director of the 1st Respondent are set for 28th February 2019 issue in this suit is whether the board is properly constituted to conduct the interviews and appointment. At this stage I wish to draw the attention of parties to the classical case of **Giella Vs. Cassman Brown (1973) EA 358** where grounds for grant of temporary injunction orders were set out at follows;

- i. The Applicant must establish that he has a prima facie case with probability of success.
- ii. That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.
- iii. When the Court is in doubt, to decide the case on a balance of convenience.

In the premises of the above grounds I hereby make a decision on a balance of convenience to grant the temporary injunction orders of stay of the interviews and appointment of the Managing Director of the 1st Respondent set for 28/2/2019 or any other time until further orders of this court are issued.

Dated and Delivered at Bungoma this 27th day of February 2019.

S.N.RIECHI

JUDGE