**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL CASE NUMBER 30 OF 2015**

JULIUS WAINAINA KARIUKI ..... 1ST PLAINTIFF/APPLICANT

ZACHARIAH MWANGI NJERU.....2ND PLAINTIFF/APPLICANT

JOHN MACHARIA NGANGA.....3RD PLAINTIFF/APPLICANT

CHARLES KARINGA WAMBUGU.....4TH PLANTIFF/APPLICANT

(Suing in their capacity as members of

NAKURU GOLF CLUB)

VERSUS

MICHAEL KANDIE,

KAMONJO KIBURI AND

ZACK IRIERI (Suing in their capacity as Chairman, Secretary and Treasurer

respectively of NAKURU GOLF CLUB .....1ST DEFENDANT/RESPONDENT

KENYA RURAL ROAD AUTHORITY.....2ND DEFENDANT/RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD DEFENDANT/RESPONDENT

**RULING**

1. The Applicants are members of the Nakuru Golf Club, a private members club within Nakuru town. In their original plaint dated and filed on the 23rd April 2015, they brought the suit against Nakuru Golf Club as 1st Respondent, Kenya Rural Roads Authority and the Attorney General as the 2nd and 3rd Respondents respectively.

2. In their prayers, they sought a prohibitory order to restrain the 1st Respondent, through its Chairman, Secretary and Treasurer from releasing funds and specifiedly KShs.2,000,000/= to Gajipara Builders Limited in respect of refurbishing the Nakuru Hospital Golf Club Road and a Declaration that there is no contract between the Nakuru Golf Club and the said Contractors as the Road Project was fully funded by

the Government of Kenya through Kenya Rural Roads Authority (KeRRA).

3. Filed with the Original Plaint was an application brought under certificate of urgency under the provisions of Order 40 Rule 1 and 2 of the Civil Procedure Rules and Section 1A and 1B of the Civil Procedure Act.

Being certified of the urgency of the application, the court on the 19th May 2015 issued Interim Orders prohibiting the 1st Respondent, (Nakuru Golf Club) from releasing funds for the refurbishing of the Nakuru Hospital – Golf Club Road to Gajipara Builders Limited pending the hearing and determination of the application.

4. On the 17th June 2015 the applicants filed an amended plaint that changed the capacity under which the 1st Respondent was initially sued. The application however remained as filed on the 23rd May 2015. Coming up for hearing was also another application brought by the applicants under certificate of urgency on the 29th May 2015. Interim Orders were also issued by the court staying the summons issued by the 1st Respondent to show cause why disciplinary action should not be taken against them pending hearing and determination of the application.

5. On the substantive application dated 23rd April 2015, this court has considered the voluminous documents filed by the applicant and the Respondents together with the detailed submissions and authorities tendered by the very able counsel for all the parties. It was submitted by the 1st Respondent that it was a private members club with over 1000 members since its inception and that the applicants are members of the club. It is not in dispute that the Nakuru Hospital Golf-Club Road now under construction is fully funded by the Government of Kenya through the 2nd Respondent that the 1st Respondent requested KeRRA for design change to the lower part of the road at the Club entrance from tarmacking to interlocking blocks – popularly called Cabroworks – at an extra cost of Kshs.2,000,000/= payable by the club and/or its membership. Though with some dissent, the general membership of the club agreed to fund the Section at the above sum of KShs.2 Million save for the four applicants who resulted to file this suit and application to restrain the club from paying up the demanded extra cost to the contractor.

6. It was submitted that the change of design at the extra cost was sanctioned by the club membership save for the four applicants who argued that since the road project was fully funded, the was no basis upon which the extra funding would be paid hence their prayers. The 1st Respondent arged that the road is 90% complete and that stopping it at the tail end Section at the club entrance would not be in the best interest of the majority club membership as it was for their benefit, happiness and enjoyment and improvement of the property. It was further urged that since the application and the prayers sought were based on the original plaint as filed, and that as the application was not amended to reflect the changed capacity of the 1st Respondent, then no orders can issue against the initial 1st Respondent as there was no longer any course of action against it. The court was urged to dismiss the application for being incompetent. It was further urged that the prayers sought in the plaint were not for injunctive relieves but declarations and prohibition orders and as such, no injunctive orders can be issued at the interlocutory stage. That being the case, the Respondents urged the court to disallow the application with costs.

7. On their part the applicants urged the court to allow the application and grant the orders of prohibition at this stage as the whole road project was riddled with integrity issues by the respondents, that the tendering process was flawed and would expose the applicants to irreparable loss and damage-as there was no privity of contract between the club and the contractor and further that the whole project was fully funded hence the request for extra payment was a baseless, and a lame excuse by the contractor to enrich itself by exploiting the extra payment from the club membership.

8. The 1st Respondent submitted that it was ready to pay to the applicants any loss they may suffer and urgued that in any event, they did not meet the threshold for the grant of injunctions as laid down under order 40 Rule 1 of the Civil Procedure Rules and particularly no claim of threatened wastage of the

property of the club were established or any breach of contract. For the record it was urgued that no prayer for injunction in the plaint was sought hence the prayers under the application being interlocutory were misplaced.

9. The 1st Respondent submitted that the applicants did not establish any *prima facie* case, nor did they establish any irreparable loss that they may suffer that can not be compensated by the club membership. It was submitted that the suit was all about construction of the road that was 90% complete and coming to court to stop completion at that stage would bring more loss to the club than the alleged loss the applicants may suffer. The balance of convenience tilts more towards the 1st respondents than to the applicants who would too suffer loss if the club were to suffer as they are members of the club.

10. I have considered all the rival arguments and submissions by counsel. It is my finding that the applicants have not met the threshold of the principles of granting injunction orders as stated in **Giella -vs- Cassman Brown & Co. Ltd (1973) EA 358** and followed in **Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 Others C.A. No. 39 of 2002.** The applicants have not demonstrated what loss they would suffer if the application is not allowed that cannot be compensated in damages. The 1st respondent was categorical that it was ready to pay any loss to the applicants if such loss is demonstrated, and that there would be no prejudice to the applicants as they would continue to enjoy the use of the club, and the improved road to the club, with the over 1000 majority members. It is my finding that the balance of convenience tilts in the Respondents favour.

11. It is noted that courts will be very slow to interfere with the internal mechanisms of private entities in dispute resolution but when approached in the right manner it will always enter into an inquiry into the nature of disputes between members and the private entities and clothe itself with jurisdiction.

12. In the circumstances and for more reasons for the ruling to be given on notice, if necessary, the application dated 23rd April 2015 is disallowed. The Interim Orders issued by the court on the 19th May 2015 are forthwith discharged.

The court notes that the application dated 29th May 2015 was to be argued simultaneously with the application dated 23rd April 2015. The applicants while arguing the application at hand did not touch on the said application. The Respondents too were silent on its fate.

I shall grant the applicants thirty 30) days from the date of this ruling to take steps to prosecute the said application failing which the Interim Orders shall stand discharged.

Costs of this application shall be costs in the course.

**Dated, signed and delivered in the open court this 23rd day of June 2015.**

**JANET MULWA**

**JUDGE**

**In the presence of:**

Karanja Lawrence for the Applicants

Kisila for 1st Respondent

Court clerk – Linah.