



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL SUIT NO. 21 OF 2011**

NAROKA GREENERS SELF HELP GROUP.....1<sup>ST</sup> PLAINTIFF/APPLICANT  
GILANI ESTATE ENVIRONMENTAL  
EXPERT SELF HELP GROUP.....2<sup>ND</sup> PLAINTIFF/APPLICANT  
LAKEVIEW USAFI WOMEN  
SELF HELP GROUP.....3<sup>RD</sup> PLAINTIFF/APPLICANT  
GATHEMA SELF HELP GROUP.....4<sup>TH</sup> PLAINTIFF/APPLICANT  
HILOMIRA ENVIRONMENTAL  
SELF HELP GROUP.....5<sup>TH</sup> PLAINTIFF/APPLICANT  
MEWAREMA SELF HELP GROUP.....6<sup>TH</sup> PLAINTIFF/APPLICANT  
PIPAS SERVICE LIMITED.....7<sup>TH</sup> PLAINTIFF/APPLICANT

**VERSUS**

MUNICIPAL COUNCIL OF NAKURU.....DEFENDANT/RESPONDENT

**RULING**

By a Notice of Motion dated and filed on 22<sup>nd</sup> February 2011 and brought under a Certificate of Urgency, the Plaintiffs/Applicants sought the following prayers -

- (a) *that pending the inter partes hearing of the Application the court do restrain the Defendant by themselves, their agents and/or servants from any way entering into garbage collection agreements with third parties other than the Plaintiffs who have been in this business for over ten years.*
- (b) *that pending the hearing and determination of this suit the Defendant be restrained by themselves, their agents and/or servants from interfering with the plaintiffs' operations and/or interfering with the plaintiffs' contract with the Defendant by way of entering into agreements with 3<sup>rd</sup> parties, or at all.*
- (c) *that costs for this application be provided for.*

The Application was based upon the grounds on the face thereof and the Supporting Affidavits of - (1) JACKSON K. BUTURA (*of Gilani Estate Environmental Expert Self Help Group - 2<sup>nd</sup> Applicant*), (2) ESTHER WANJIRU KIRAGU (*of Lake View Usafi Women Group, 3<sup>rd</sup> Applicant*), (3) WILLY K. MUCHINA (*of Gathama Garbage Collectors Self Help Group - 4<sup>th</sup> Applicant*), (4) ELENA NJERI NDEGWA (*of HILORIMA ENVIRONMENTAL SELF HELP GROUP - 5<sup>th</sup> Applicant*), (5) JAMES

KILONZO (*Chairman - MEWAREMA SELF HELP GROUP*), (6) BENSON KARUKU MACHARIA of PIPAS SERVICE LTD (*7<sup>th</sup> Applicant*). There seems to have been no Supporting Affidavit from Naroka Greeners Self Help Group - attached to the bound copy of the Application filed in court.

The application was opposed through the Replying Affidavit of KAIO KATHUU MBULUSI the Respondent's Town Clerk sworn and filed on 23<sup>rd</sup> March 2011, and dealt with the merits and demerits of the claims by each of the Applicants, and specifically avers that the Garbage Collection and Disposal Agreement with the 1<sup>st</sup>, 6<sup>th</sup> and 7<sup>th</sup> Applicants had expired at the time tenders were advertised, the agreements had run their terms. The Defendant also denied being under any agreement with the 2<sup>nd</sup> and 4<sup>th</sup> Applicants.

The Defendant concedes that it has a Memorandum of Understanding with the 3<sup>rd</sup> Applicant, which is not affected with the tender awards because of its unique zone, and that this Applicant has no basis for suing in this matter.

And for the 5<sup>th</sup> Applicant, the Respondent avers that, as a licensing authority, it has no mandate to assist any particular service provider.

These and all the rival arguments are considered in the following passages of this Ruling. The principles upon which the court may grant interlocutory injunctions are now deeply entrenched in our law reports and books. These principles were laid down in the case of **GIELLA VS. CASSMAN BROWN & CO. LTD, [1969] E.A.** and are these -

- (1) *that the plaintiff/applicant must show a prima facie case with a probability of success,*
- (2) *that the loss (if any), which may be suffered by the applicant cannot be adequately compensated in damages,*
- (3) *in the case of doubt, the court will determine the application on the balance of convenience.*

The first question therefore is whether the applicants have established a case with a probability of success.

Mr. Gakinya learned counsel for the applicants submitted to the court that the applicants are volunteers who offered their services to collect garbage from their own homes and the homes of their fellow residents because the Respondent had completely failed to render those services and that after years of rendering those services without the assistance, the Respondent joined them and continued to offer the collection of garbage.

Mr. Gakinya also submitted that the Applicants were so successful that the Respondent in conjunction with the Government, UN Habitat and the World Bank offered some of their members training in order to build capacity, and eventually gave them a garbage collection truck for which the Respondent was to provide a driver to facilitate the collection of a levy from the consumers.

It was also counsel's submission that the Respondent made similar arrangements with other groups who were not collecting solid waste from the residents, and had offered to clean roads at no cost to the Respondent.

Counsel further submitted that outside this co-operation, the Applicants also assisted the Respondent in developing the Respondent's **Environment Management By-Laws** which outlined the ways of management and disposal of solid waste in the Respondent's area, and on that basis the Applicants had been working as partners.

The applicants claim that after about four years of cooperation, the Respondent realized that solid waste management was a hugely profitable business and sent out hugely restricted tenders including a requirement that the bidders should demonstrate experience in solid waste management.

Counsel also submitted that while all this was going on, the Applicants were forced to take loans, underwent training in seminars in order to build capacity, and at the end of it all, were forced to compete in tenders the results of which they were not informed, and were won by close associates or officers of the Respondent, and who had not even tendered.

In addition counsel submitted, the Respondent owes the Applicants large sums of money for work done in clearing roads and open spaces, and deny any suggestion that they are a monopoly, and in so far as the Defendant owes them money, they have a prima facie case with a probability of success, that they have *locus*, and since the prayers they seek are equitable the court should grant them.

On the principle of loss, counsel submitted that the Applicants were being excluded from the Respondent's business and after all they had done in drawing up the Respondent's Strategic Plan, and the By-Laws on Management and Disposal of Solid Waste.

Miss Gichuki, counsel for the Respondent opposed the application on two principal grounds, *locus* and that the procedure for questioning the Respondent's decision was by way of judicial review, and not a normal suit.

I think the success and failure of the applicants' case hinges on the determination of both issues but more so the latter question. On the first question, the Applicants not being either a Partnership or Limited Liability Companies as known in law, they technically have no *locus standi* to bring this suit. They failed to name their Chief Officers - Chairman, Secretary and Treasurer. But even if they had locus, what comes clearly out from the submissions of counsel for the Applicants is that the Applicants are public spirited neighbourhood watchers who are keen and have always maintained a clean environment within their estates, and that the Respondent recognized this, and tapped their talent in developing by-laws for solid waste management which includes collection and disposal of solid waste. The Applicants' efforts were also recognized by Government, UN Habitat, and the World Bank which gave the Respondent a track to assist in the collection and disposal of refuse.

In this regard some members of the Applicants secured specific contracts with the Respondent, and that some of such contracts were spent, and others were still current at the time of filing the suit herein.

However upon the advent of the Public Procurement and Disposal Act 2005, all major services in all public institutions which include Central and Local Government institutions such as the Respondent, which is a local authority, had to publicly advertise all their services for persons who are qualified to bid, be scrutinized by the procurement committees of such institutions and if found qualified in accordance with the requirements of the specific tender, got awarded the tender, and thereafter a specific contract for the specific service of works or services to be provided.

The Public Procurement and Disposal Act, 2005 has an elaborate system of seeking clarifications of a tender even before tendering, and after tendering, and award of tenders, and another elaborate system of appeals, to the Public Procurement Administrative Review Board and thereafter appeal to the High Court.

In this case the applicants say, that the terms of the tender were highly restrictive. They are silent on whether they sought any clarification into why the tenders were highly restrictive (*if at all*). They are also silent on whether they challenged the awards made by the Respondents, whether to persons or companies closely associated with the officers serving with the Respondent or others. There is, in addition, no material that such tenders were awarded on the basis of "*cronyism*" i.e. appointment without regard to qualification.

On the question whether the Applicants or any one of them is owed moneys by the Respondent, and which moneys are due, and not paid, the remedy is not an injunction, but a suit for moneys due, and perhaps breach of contract if at all.

Although Ms Gichuki counsel for the Respondent did not say so, but the officer responsible office of the Respondent would not have failed to appreciate and recognize the efforts of the Applicants and their members in helping to keep the Municipal Council of Nakuru and its environs clean and accessible, or in assisting to develop Environmental Management By-Laws. Such by-laws cannot however replace or be superior to or take the place of Public Procurement and Disposal Act 2005, in so far as the advertisement and procurement of services or works for the Respondent Council are concerned.

As for the services the Applicant's or some of them provided, unless specifically agreed for payment by the Respondent Council, or individuals, the law is clear - "*volenti non fit injuria*" as the Latins used to say, *that to which a person consents cannot be considered on injury* - "*the law does not assist volunteers.*"

For those reasons I find and hold that the Applicants have not established a prima facie case with a probability of success.

For the same reasons the Applicant's have not established a case that they or any one of them will suffer damage which cannot be adequately compensated in damages should they win the case against the Respondent.

Having come to this conclusion, I do not think that consideration of the third principle, convenience, would add any value to this conclusion. Neither is it necessary for me to discuss the question of *locus standi* of the applicants, as that is a question which commonly be properly addressed at or before the hearing of the suit.

For those reasons, the Applicant's Notice of Motion dated and filed on 23<sup>rd</sup> February 2011 is dismissed with costs to the Respondent.

There shall be orders accordingly.

**Dated, signed and delivered at Nakuru this 10<sup>th</sup> day of June 2011**

**M. J. ANYARA EMUKULE**  
**JUDGE**