MANDATORY INJUNCTION

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO.212 OF 2009

KENYA LOCAL GOVERNMENT WORKERS UNION (NAKURU BRANCH)…….....…….....APPLICANT/ PLAINTIFF

VERSUS

NAKURU WATER AND SANITATION SERVICES COMPANY LIMITED…….RESPONDENT/DEFENDANT

RULING

This action was brought by way of a plaint on 24th July, 2009. It is still pending hearing. Meanwhile, there are four applications undetermined. There is the instant application to which this ruling relates, dated 24th July, 2009 seeking orders to compel the respondent to deduct and remit the applicant's members' membership dues to the applicant.

Then, there is Chamber Summons by the respondent dated 12th August, 2009 for orders that the plaint be struck out. The third application is dated 29th January, 2010 brought by the applicant to restrain the respondent from requiring/compelling the applicant's members to show cause why they should not be dismissed.

Finally, the respondent applied by a motion that the orders issued on 1st February, 2010 be vacated and/or set aside. The orders in question directed that the *status quo*be maintained.

Learned counsel for the parties must seriously think of how to proceed with the three last-mentioned applications as they serve no useful purpose in this file.

I turn to the application dated 24th July, 2009 and reiterate the prayers sought, that the respondents, Nakuru Water and Sanitation Services Company Limited:

"(c)……be compelled to deduct and remit the applicant/plaintiff membership dues pursued (sic) to the letters and list of plaintiff's union members authorizing the defendant to deduct and remit to the applicant their union dues pending the hearing and determination of this suit.

(d) That the defendant workers be at liberty to join and participate in any trade union of their choice."

It is the applicant's contention that its members are employees of the respondent; that the employees

(more than 200) have authorized the respondent, pursuant to the latter's directive to deduct and remit their contributions to the applicant. The respondent has failed since this authorization to deduct and remit the members' dues to the applicant; that this applicant has acted maliciously.

The respondent has denied the foregoing allegations arguing that the application is misconceived, bad in law, incompetent and does not disclose any cause of action; that there is no relationship between the applicant and the respondent; that the application is *sub-judice* Nkr. H.C.C.C.No.143 of 2006; that there is already a Recognition Agreement between the respondent and the National Union of Water and Sewerage Employees.

I have considered these rival arguments, the applicant's written submissions and a copy of the ruling in Nkr.H.C.C.C. No.143/2006. The application which clearly seeks order of mandatory injunction raises only one broad issue, namely whether the relief sought is available to the applicant being an interlocutory relief and whether it is *sub-judice.*

It is conceded that there is pending Nkr.H.C.C.C.No.143 of 2006 between the parties herein. The applicant has, however, denied that the two matters relate to the same cause of action. **Section 6** of the **Civil Procedure Act** provides that:

"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties…….…. where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

(Emphasis supplied)

I have perused a copy of the plaint and other pleadings in Nkr.H.C.C.C.No.143 of 2006 annexed by both parties in these proceedings and find that the issues raised in that case are substantially the same as those being raised in this matter. They both deal with the respondent's employee's membership to the applicant. For that reason, these proceedings are, in my view *sub-judice* and are hereby stayed.

The second matter deals with the relief sought, namely a mandatory injunction. The law on interlocutory mandatory injunction is now settled and I can do no better that to quote Megarry, J (as he then was) in **Sheperd Homes Limited** Vs. **Sandahm** (1971) 1 Ch. 34 followed in many local case including **East African Fine Spinners Limited (In Recevership) and 3 others** Vs. **Bedi Investment Limited,** Civil Application No.NAI 72/1994 (uc). He said:

"…….it is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation."

Megarry, J continued:

"Thirdly, on motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction."

To emphasise this point, the passage in **Halsbury's Law of England Vol.24** paragraph 948 summarizes the principle governing the grant of a temporary mandatory injunction. It reads:

"A mandatory injunction can be granted on an interlocutory application, as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the

plaintiff, ……a mandatory injunction will be granted on an interlocutory application."

With the controverted averments that I have set out earlier, this is not an "*unusually strong and clear*" application in which the court can direct the respondent to deduct and remit funds without hearing the matter on merit.

For these reasons, the application fails and is dismissed with costs.

Dated, Delivered and Signed at Nakuru this 6th day of June, 2011.

W. OUKO
JUDGE