



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

**Civil Suit 143 of 2006**

**NAKURU WATER AND SANITATION**

**SERVICES CO. LTD.....PLAINTIFF**

**VERSUS**

**MIKE OLUOCH.....1<sup>ST</sup> DEFENDANT**

**JOEL OTIENDE.....2<sup>ND</sup> DEFENDANT**

**LINCY VOREGE.....3<sup>RD</sup> DEFENDANT**

**JOHN NDUNDA.....4<sup>TH</sup> DEFENDANT**

**MARY WAMBUI.....5<sup>TH</sup> DEFENDANT**

**E. NDUTA.....6<sup>TH</sup> DEFENDANT**

**FRANCIS MUHOHA.....7<sup>TH</sup> DEFENDANT**

**VIOLA CHERENGAT.....8<sup>TH</sup> DEFENDANT**

**OBARA ODHIAMBO.....9<sup>TH</sup> DEFENDANT**

**JUSTUS MUSOMI.....10<sup>TH</sup> DEFENDANT**

**GEORGE MAINA.....11<sup>TH</sup> DEFENDANT**

**KENYA LOCAL GOVERNMENT**

**WORKERS UNION.....12<sup>TH</sup> DEFENDANT**

**RULING**

The plaintiff is a limited liability company incorporated under the Companies Act and registered under

the Water Act. It claims in its plaint that pursuant to that registration it commenced its operations in Nakuru initially with staff previously employed by the Municipal Council of Nakuru. On 6<sup>th</sup> July 2006 the defendants jointly and severally marched into the premises of the plaintiff at Nakuru and demanding to enforce a collective agreement allegedly reached between the Association of Local Government Employees and Kenya Local Government Workers Union, the 13<sup>th</sup> defendants, evicted the Managing Director and Commercial Manager of the plaintiff from their offices thus disrupting the operations and business of the plaintiff.

The plaintiff claims that that act was not only illegal and a blatant violation of its rights but it also exposed the plaintiff's employees to public ridicule, humiliation and odium. The plaintiffs are apprehensive that unless restrained the defendants will make good of their threats to invade it again and continue to disrupt its operations. It therefore filed this suit and seeks an order that it is an independent employer not bound by the said collective agreement to which it was not party and a perpetual injunction to restrain the defendants by themselves, their employees and/or agents from entering the plaintiff's premises and disrupting or in any way interfering with its activities.

On 20<sup>th</sup> November 2008 the plaintiff filed a Chamber Summons under **Order 39 Rules 1 & 2** of the **Civil Procedure Rules** as well as **Section 3A** of the **Civil Procedure Act** and sought an injunction to restrain the defendants by themselves, and/or their representatives or agents from meeting the employees of the plaintiff, holding, organizing and/or conducting elections for NAWASSCO Union Branch and/or in any way interfering with the activities of the plaintiff. In the affidavit in support of that application Simon Main, a Senior Sewage Operator of the plaintiff company claiming to have the authority of the directors of the plaintiff deposed that the employees of the plaintiff were deployed by the Municipal Council of Nakuru to the plaintiff but employed under different contracts of employment. He said the water companies have formed a new union by the name National Union of Water and Sewage Employees which was gazetted on 26<sup>th</sup> August 2006 and they therefore have nothing to do with the 13<sup>th</sup> defendants. He claimed that if the meeting which was scheduled for 22<sup>nd</sup> November 2008 or any other meeting is allowed be held it will confuse the plaintiff's employees who are already making their contributions to the new union and disrupt the plaintiff's activities.

In his replying affidavit sworn on 16<sup>th</sup> October 2006 in response to an earlier application and the one sworn on 26<sup>th</sup> November 2008 in response to this application, Joel Otiende the 2<sup>nd</sup> defendant started by challenging the competence of this application and the suit itself. He said M/S Odhiambo & Odhiambo Advocates have no authority from the directors of the plaintiff company to file this suit. He also contended that the application has no relation whatsoever with the averments in the plaintiff's plaint. To that extent he averred that both the application and the suit are bad in law and should be struck out.

On the merits of the application, he denied that the defendants in any way entered the plaintiff's premises and/or disrupted its business as claimed. He dismissed the plaintiff's claim that its employees are not members of the 13<sup>th</sup> defendant and contended that though seconded to the plaintiff the employees still remain employees of the Local Government and are therefore covered by the said Collective Agreement. He said in any case the number of the plaintiff's employees does not meet the threshold set by Rule 17 of the National Union of Water and Sewage Employees Constitution for them to form a branch. He accused the plaintiff of material non-disclosure of the fact that it knew of the said agreement which was the subject of Trade Dispute No. 118 of 2006 before the Industrial Court and was amicably resolved by Justice Steward Madzayo of that court. He denied that the defendants ever met or attempted to meet the employees of the plaintiff. He said it is the employees themselves who, in exercise of their inalienable right under the Trade Disputes Act and the Constitution decided to meet and elect their officials. He urged me to dismiss this application with costs.

Relying on the averments in the plaint and the affidavit in support of the application counsel for the plaintiff submitted that the plaintiff is not an extension or subsidiary of the Municipal Council of Nakuru. Concurring with Justice Kimaru's ruling of 24<sup>th</sup> November 2006 on the plaintiff's earlier application for injunction that this is not a trade dispute counsel submitted that the issue in this suit is whether or not the plaintiff has recognized the 13<sup>th</sup> defendant's Collective Agreement as binding on it. The defendants

claim that only 20 employees are required for recognition of its CBA is incorrect. He said that under **Section 54(1)** of the **Labour Relations Act, 2007** an employer is under obligation to recognize a Trade Union if it represents a simple majority of its employees. In this case the defendants do not have a majority of the plaintiff's employees and are by the proposed meetings trying to tram up support from the plaintiff's employees in order to form a branch and force the plaintiff to pay subscriptions to it. On the authority of the Court of Appeal's decision in the case of **Agricultural Finance Corporation Vs Lengetia Ltd [1985] KLR 765** that a contract cannot be enforced against a person who is not a party to it, they submitted that the defendants should not be allowed to enforce the CBA against the plaintiff to which it is not a party.

On their part counsel for the defendants dismissed this application as untenable for the reason that it is not supported by the averments in the plaint. They said that the plaintiff is being used as a proxy of the National Union of Water and Sewage Workers to fight its competitor the Kenya Local Government Workers Union. He said this is clear from the fact that the 1<sup>st</sup> to the 12<sup>th</sup> defendants who are employees of the plaintiff are members of the Local Government Workers Union. They urged me to dismiss the application with costs.

I have considered these rival submissions and the parties' pleadings. Employees like other citizens of this Country have under **Section 80(1)** of the **Constitution** a constitutional right of assembly. **Section 4** of the **Labour Relations Act 2007** allows employees of any organization the right to participate and elect officials of their union. In my view employees of an organization are at liberty to even change their trade union if they so wish. That right cannot and should not be hampered by anybody including this court. I cannot see how a meeting that was scheduled to be held on 22<sup>nd</sup> November 2008, a Saturday, in the Old Town Hall could disrupt the activities or affect the business of the plaintiff whose offices are not in that hall. Whether or not the resolutions passed in that meeting would in any way affect the plaintiff is completely different matter. I agree with counsel for the defendants that what the plaintiff seeks in this application is not supported by the averments in its plaint. In the circumstances I find no merit in this application and I accordingly dismiss it with cost.

**DATED and delivered this 25<sup>th</sup> day of November, 2009.**

**D. K. MARAGA**

**JUDGE.**