REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Case 143 of 2006

NAKURU WATER & SANITATION SERVICES CO. LTD…..PLAINTIFF

VERSUS

MIKE OLUOCH & 12 OTHERS…….....…DEFENDANTS

RULING

This is an application by the plaintiff made under **Order XXXIX rule 1 & 2 of the Civil Procedure Rules** seeking to restrain the defendants herein by themselves, their agents or representatives by means of an interlocutory injunction from disrupting, evicting or in any other way interfering with the activities of the plaintiff's company pending the hearing and determination of the suit. The grounds in support of the application are stated on the face of the application which is basically that the defendants had threatened to disrupt the plaintiff from performing its functions if the plaintiff did not abide and implement a Collective Bargain Agreement (CBA) which had been entered between the 13th defendant and the Association of the Local Government Employers. The plaintiff's complaint is that it is being forced to implement a CBA which it was not party to. The application is supported by the annexed affidavit of Jason O. Ongeri, the managing director of the plaintiff.

The application is opposed. The defendants have filed a notice of preliminary objection and a replying affidavit sworn by the 2nd defendant Joel Ogola Otiende, the Nakuru Branch Union Secretary of the 13th defendant. In the preliminary objection, the defendants content that the plaintiff's suit was incompetent because it had been filed on behalf of a company before a resolution had been passed by the directors of the company. They further stated that the suit was *res judicata* because it raised issues which were heard and determined by the Industrial Court. In the replying affidavit, the 2nd defendant swore that the plaintiff was a wholly on subsidiary of the Nakuru Municipal Council which was a signatory to the CBA and whose employees were transferred to the plaintiff's company when it was formed in the year 2002. In paragraph 7 of the said replying affidavit, the 2nd defendant swore that;

"*Pursuant to the Articles and Memorandum of Association of the applicant (plaintiff) the applicant is an affiliate body to the Local Authorities and was created to provide special services of water and sanitation to the Local Counties. Allegation that it is a distinct and independent entity are misleading and or non-disclosure of material facts (annexed and marked 'LKM 2' is a copy of the Memorandum of Associates (sic)).*"

In effect it is the defendant's case that the fact that the plaintiff is a wholly owned subsidiary of the Municipal Council of Nakuru, then it is bound by the CBA that was entered between the Municipal Council of Nakuru and the 13th defendant, the union representing the employees working for the Municipal Council of Nakuru.

At the hearing of the application, I heard the submission made by Mr. Akang'o on behalf of the plaintiff and by Mr. Mbuvi on behalf of the defendants. Mr. Akang'o reiterated the contents of the application and the supporting affidavit. He submitted that the plaintiff was incorporated in the year 2002 as a wholly owned subsidiary of the Municipal Council of Nakuru pursuant to the amendments which were made to the Local Government Act and the Water Act. He submitted that the effect of incorporation of the plaintiff meant that the plaintiff became an independent entity from its share holder, the Municipal Council of Nakuru. He submitted that CBA which the defendants were seeking to have the plaintiff implement was an agreement which was entered between the 13th defendant and the Municipal Council of Nakuru. The plaintiff was not a party to the said CBA. He submitted that as a separate entity from the Municipal Council of Nakuru, the plaintiff would not be forced in law to implement a CBA which it never participated during its negotiation and its signing. Mr. Akang'o argued that the decision of the industrial court which the defendants were referring to did not bind this court nor was the plaintiff a party to the said proceedings before the industrial court. The plaintiff referred this court to several decided cases in support of its case. Mr. Akang'o further submitted that for the above reasons, the plaintiff had established a prima facie case with a likelihood of success and therefore it should be granted the orders of injunction sought with costs.

Mr. Mbuvi, learned counsel for the defendants opposed the application. He reiterated the contents of the notice of preliminary objection and the replying affidavit sworn by the 2nd defendant. He submitted that the plaintiff's suit was incurably defective because the plaintiff had filed the suit before a resolution by the directors of the plaintiff had been passed authorizing the suit to be filed. He further submitted that nothing had been placed before this court by the plaintiff to support the allegation that the defendant had violently disrupted the activities of the plaintiff. He submitted that the plaintiff had not proved that a report had been made to the police of the said alleged acts of violence by the defendants. He argued that the CBA which was entered between the Municipal Council of Nakuru and the 13th defendant bound the plaintiff as a wholly owned subsidiary or affiliate of the said Municipal Council of Nakuru. He submitted that the Industrial Court had heard the matters which the plaintiff was seeking to canvass before this court and determined it in favour of the 13th defendant. He further submitted that the plaintiff had not placed before this court materials which would make this court reach a finding that the plaintiff had established a prima facie case. He argued that the affidavit evidence that the plaintiff was relying on swore to facts which were inconsistent and contrary to the plaintiff's own pleadings. He further argued that the plaintiff had brought the case before this court on purely matters which the industrial court has exclusive jurisdiction to hear and determine. He urged this court to dismiss the plaintiff's application with costs.

I have read the pleadings filed by the parties in this suit in support of their respective cases. I have further carefully considered the rival submissions made before me including the decided cases which were referred to me. The issue for determination by this court is whether the plaintiff has established a case to enable this court grant it the orders of injunction sought. The principles to be considered by this court in deciding whether or not to grant the order of interlocutory injunction sought by the plaintiff are well settled. The plaintiff must establish that it has a prima facie case with a likelihood of success when the case would finally be heard on merits. The plaintiff must also establish that it would suffer irreparable loss or damage which may not likely be compensated by an award of damages. And finally, if the court is in doubt, it may decide the application on a balance of convenience (**See Giella vs Cassman Brown [1973] EA 358**).

The issue in dispute in this application is whether the plaintiff is bound by the CBA which was entered between the association representing the Municipal Council of Nakuru and the 13th defendant, a union representing the majority of the employees of the Municipal Council of Nakuru. It is not disputed that the Municipal Council of Nakuru incorporated the plaintiff for the purposes of providing water and sanitation services to the residents within the jurisdiction of the Municipal Council of Nakuru. It is further not disputed that the plaintiff is a wholly owned subsidiary or affiliate (*as referred to by the defendants*). The plaintiff's company was incorporated in the year 2002 and upon incorporation took over the functions of providing water and sanitation services from the Municipal Council of Nakuru. The employees who used to work in the water and sewerage departments of the Municipal Council of Nakuru were absorbed by the plaintiff. However from the pleadings filed by the parties herein, it is apparent that the workers who

joined the plaintiff company were still members of the 13th defendant. When the CBA was entered into between the Association of Local Government Employers and the 13th defendant and which was supposed to come into effect on 1st of September, 2005, the employees of the plaintiff who were members of the 13th defendant assumed that the said implementation of the CBA who also apply to them.

The plaintiff company is however of the contrary view. It has submitted before court that it is an independent entity separate from its one and only shareholder, the Municipal Council of Nakuru. It is the plaintiff's cases that it was neither consulted nor did it participate in the negotiations that led to the signing of the said CBA between the representative of the Municipal Council of Nakuru and the 13th defendant. The plaintiff further argued that it was a member of the Association of Local Government Employers. On the other hand, the defendants are of the firm opinion that the plaintiff being an 'affiliate' of the Municipal Council of Nakuru, ought to implement the said CBA signed on its behalf by the said Municipal Council of Nakuru.

Having carefully evaluated the matters in dispute in this application, the issue that would determine this case is whether the plaintiff is a party to the CBA which was entered between the Association representing the Municipal Council of Nakuru and the 13th defendant. I have perused the said CBA. It is clear that when the said agreement was signed on the 24th of November, 2005 between the association representing Local Governments and the 13th defendant, it was mistakenly stated that the CBA would apply to employees of Local Authorities and the water companies established by the Local Authorities. It was however realized later that the water companies ought not to have been included because they were independent entities. By a letter written on the 6th of March, 2006 by the said association, the association requested for the CBA to be amended to exclude the water companies from the said agreement. Although the 13th defendant was not amused by the turn of events, the Permanent Secretary, Ministry of Local Government by his letter dated the 5th of May, 2006 directed that the employees of the water companies incorporated by the various local authorities be excluded from the said CBA. It is therefore clear that the employees of the plaintiff, being no longer employees of the Municipal Council of Nakuru, cannot be beneficiaries of the CBA entered between the 13th defendant and the Municipal Council of Nakuru.

Being an independent entity, the 13th defendant ought to first apply to be recognized as a union representing the employees of the plaintiff then it can enter into a CBA with the plaintiff at an appropriate time. I do not subscribe to the argument made by the defendants that the plaintiff is an extension of the Municipal Council of Nakuru, its only shareholder. As was held by the Privy Council in the New Zealand case of **Lee vs Lee's Air Farming Ltd [1960] 3 All ER 420** where the Privy Council was asked to determine whether a director of a company who was its majority shareholder could enter into an agreement with the said company, Lord Morris of Borth-y-Gest**,** reading the judgment of the court stated at page 425 that

"***Their Lordships find it impossible to resist the conclusion that the active aerial operations were performed because the deceased was in some contractual relationship with the respondent company. That relationship came about because the deceased, as one legal person, was willing to work for and to make a contract with the respondent company which was another legal entity. A contractual relationship could only exist on the basis that there was consensus between two contracting parties. It was never suggested (nor, in their Lordships' view, could it reasonably have been suggested) that the respondent company was a sham or a mere simulacrum. It is well established that the mere fact that some one is a director of a company is no impediment to his entering into a contract to serve the company. If, then, it be accepted that the respondent company was a legal entity, their Lordships see no reason to challenge the validity of any contractual obligations which were created between the respondent company and the deceased. In this connexion, reference may be made to a passage in the speech of Lord Halsbury L.C in Salomon vs Salomon & Co. (4):***

'My Lords, the learned judges appear to me not to have been absolutely certain in their own minds whether to treat the company as a real thing or not. If it was a real thing; if it had a legal existence, and if consequently the law attributed to it certain rights and liabilities in its constitution as a company, it

appears to me to follow as a consequence that it is impossible to deny the validity of the transactions into which it has entered.'

A similar approach was evidenced in the speech of Lord Macnaghten when he said (5):

'*It has become the fashion to call companies of this class 'One man companies'. That is a taking nickname, but it does not help one match in the way of argument. If it is intended t convey the meaning that a company which is under the absolute control of one person if not a company legally incorporated, although the requirements of the [companies] Act of 1862 may have been complied with, it is inaccurate and misleading: if it merely means that there is a predominant partner possessing an overwhelming influence and entitled practically to the whole of the profits, there is nothing in that that I can see contrary to the true intention of the Act of 1862, or against public policy, or detrimental to the interest of creditors.*'

Nor, in their Lordships' view, were any contractual obligations invalidated by the circumstance that the deceased was sole governing director in whom was vested the full government and control of the respondent company."

In the present application, it cannot be said that the plaintiff, as wholly owned subsidiary of the Municipal Council of Nakuru, is part and parcel of Municipal Council of Nakuru and therefore bound by an agreement entered between the Municipal Council of Nakuru in its capacity as such, and with another legal entity. I therefore hold that the plaintiff, having been excluded from the negotiations leading to the CBA between the 13th defendant and the Association representing the Municipal Council of Nakuru, cannot be bound by the resultant CBA. I therefore hold that the plaintiff has established a prima facie case with the likelihood of success.

As to the complaint by the defendants that the plaintiff had not annexed a resolution by its directors granting it permission to file suit against the defendants, I think the correct position of the law is that such resolution is required to be filed by the company in the suit anytime before the suit is heard during the main hearing. As to whether the decision by the Industrial Court referred to by the defendants renders the plaintiff's suit *res judicata*, I hold that said proceedings before the Industrial Court cannot be said to be proceedings before a High Court and therefore lead to the High Court to reach a determination that a case is *res judicata*. In any event, having perused the said proceedings, it is clear that the plaintiff was not a party to the said suit before the Industrial Tribunal. The said tribunal has not rendered any decision in favour of the 13th defendant against the plaintiff. I further hold that the issues that were canvassed before this court in this application were not matters that are within the purview of the Industrial Court. This court is not being called upon to determine a labour dispute; rather it is being asked to determine whether or not an agreement existed between the plaintiff and the defendants.

The upshot of the above reasons is that the application filed by the plaintiff dated the 10th of July, 2006 is hereby allowed. The defendants, jointly and severally, by themselves, their agents and or representatives are hereby restrained by means of an interlocutory injunction from disrupting, evicting or in any way interfering with the discharge of the mandate conferred on the plaintiff pending the hearing and determination of the suit filed. The plaintiff shall have the costs of the application.

DATED at NAKURU this 24th day of November, 2006

L. KIMARU

JUDGE