REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CBA NO. 34 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF REGISTRATION OF COLLECTIVE BARGAINING AGREEMENT CA NO. 34 OF 2020

KENYA COUNTY GOVERNMENT WORKERS UNION UNION

VERSUS

NAIROBI WATER AND SEWERAGE COMPANY LIMITED............EMPLOYER

AND

NATIONAL UNION OF WATER AND SEWERAGE EMPLOYEES...OBJECTOR

RULING

The parties hereto have in their submissions wrongly referred to KCGWU as Claimant, Nairobi Water as Respondent and NUWASE as Interested Party hence the need to define the parties from the outset.

In order to avoid confusion, the Union will be referred to as KCGWU and the Objector as NUWASE. The Employer will be referred to as Nairobi Water.

What is coming up for determination before the Court is the Notice of Motion by NUWASE dated 24th February 2020 and the Notice of Preliminary Objection by KCGWU dated 10th March 2020.

The NUWASE is seeking for orders:

1. Spent.

2. The Court be pleased to stay the intended Registration

of the CBA No. 34 of 2020 herein, scheduled for registration on 25/2/2020 before this court pending hearing and determination of this Application, for the reasons that the union of Local Government [now Kenya County Government Workers Union] is a stranger and is masquerading to be representing the employees in the sector contrary to court orders both in the court of Appeal Civil Appeal no. 18 of 2013 National union of water and sewerage employees and 3 others versus Nairobi water and sewerage company limited and 3 others and ELRC No. 755 of 2013 as consolidated with ELRC causes 2133 of 2011, 823A of 2012 and 2504 of 2012, 2020 of 2012, 2062 of 2012, 1526 of 2013, 1007 of 2017, 977 of 2017 and 2107 of 2016.

3. That there be a permanent order barring Nairobi City Water and Sewerage company Limited and Kenya County Government Workers Union from negotiations on the same subject matter.

4. That a declaratory order do issue barring Nairobi water from deducting and remitting union dues from any employee of Nairobi water to the Kenya county government workers union.

5. That cost of this Application be provided for.

The Application is based on the grounds that NUWASE and Nairobi Water had a valid recognition agreement which was nullified by the

court in ***ELRC Cause No. 823 of 2012***. That NUWASE appealed at the Court of Appeal and the said Ruling was set aside and the status quo before the said agreement reinstated. That KCGWU and Nairobi Water have however deliberately colluded and purported to negotiate a CBA which is scheduled for registration by this Court despite court orders barring them from being in the sector. That unless they are restrained, the said court orders will be rendered nugatory. That both KCGWU and Nairobi Water participated in the aforementioned suits before the Employment and Labour Relations Court and the Court of Appeal and are therefore abusing the court's process. That the action and/inaction of KCGWU and Nairobi Water is frivolous, vexatious and against the law of natural justice and the Constitution. That it is in the interest of justice that the orders sought be granted. Further that no prejudice shall be suffered by KCGWU and Nairobi Water.

In the Supporting Affidavit sworn by NUWASE's Secretary General, Elijah Otieno Awach he annexed a copy of the recognition agreement dated 11th July 2006 between NUWASE and Nairobi Water and a copy of the Judgment of the Court of Appeal in **Civil Appeal No. 18 of 2013**. He avers that in a Ruling dated 22nd November 2019, the Employment Labour Relations Court upheld the said Judgement in **Civil Appeal No. 18 of 2013** which set aside the orders of 13th December 2013 by Nzioki Wa Makau J. He further avers that this Court has jurisdiction to supervise its orders and put on halt and or to permanently stop the impending danger from recurring as well as restoring peace in the said industry.

KCGWU raised a Preliminary Objection seeking to dismiss/strike out NUWASE's application dated 24th February 2020 with costs for reasons that:

> *1) The purported Interested Party does not at all have the requisite Locus Standi in the above matter and to address the Court since it is not properly on record, a party to the purported suit or to the duly Negotiated and Concluded Collective Bargaining Agreement between KENYA COUNTY GOVERNMENT WORKERS UNION and NAIROBI WATER AND*
>
> *SEWERAGE COMPANY LIMITED.*
>
> *2) Both Claimant and Respondent have never litigated under the same title nor suit and over the same subject matter, hence wrongly cited.*
>
> *3) There is absolutely no nexus between a Recognition Agreement and the right of a worker to be represented by a Union of his/her choice as appears to be the narrative being advanced herein by the Interested Party.*
>
> *4) Declaratory orders and/or final orders cannot issue in an interlocutory application.*
>
> *5) There is no main suit for which the Interested Party could have sought an interlocutory order.*
>
> *6) The said Application by the Interested Party is incompetent, a flagrant abuse of the due process, it is vexatious and a waste of the Court time and must therefore be dismissed and not without costs.*

KCGWU filed a Replying Affidavit sworn on 16th March 2020 by its General Secretary, Roba Duba who avers that KCGWU represents 99.9% of Nairobi Water's Unionisable employees and has a duly signed Recognition Agreement with Nairobi Water. Further, that KCGWU and Nairobi Water have previously executed a CBA in 2015 which was duly registered by this court under entry number ***RCA No. 224 of 2015***. That KCGWU has similarly observed due process in its quest to register the CBA for 2020 with several meetings held with Nairobi Water as demonstrated in his attachments marked ***RD4, RD5*** and ***RD6***. He avers that unless NUWASE proves any illegality during negotiations or that the pending registration of the CBA in Court is as a result of coercion, duress, misrepresentation or mistake, this Court should not entertain the allegations and application herein.

He avers that even if the Court were inclined to enjoin NUWASE, it would be doing so in vain since there is no current or previous suit between Nairobi Water and KCGWU regarding the CBA. Further, that NUWASE ought to have sought substantive reliefs in a main proceeding because the prayers it seeks are mandatory in nature. It is his averment that the Court of Appeal in its judgment did not pronounce itself on the issue of representation or the appropriate union for Nairobi Water's employees since it is trite law that the union with the simple majority shall be recognized by an employer for purposes of industrial relations. That the Constitution, the Labour Relations Act and the Universal Declaration of Human Rights grant KCGWU the right to associate in trade union activities and which rights cannot be limited at any cost.

He further avers that since NUWASE has failed to prove a prima facie case to warrant grant of the injunctive orders sought, its application should be dismissed with costs to KCGWU. That the Court should also allow the registration of the CBA between KCGWU and Nairobi Water.

Nairobi Water also filed its Replying Affidavit sworn on 13th March 2020 by its Legal Coordinator, Patrick Maina who produced a copy of a Ruling delivered by the Court of Appeal on 26th July 2013 which dismissed NUWASE's application seeking to stop ongoing remittances to the 3rd Respondent (KCGWU). He also produced a copy of Nairobi Water's application for review of judgment dated 19th December 2018 which he avers is pending before the Court of Appeal in Civil Appeal No. 18 of 2018 and is founded on the following grounds:

> *a) Civil Appeal No 18 of 2013 proceeded for hearing on 26th April, 2017 in the absence of all Nairobi Waters.*
>
> *b) The Appellants, in the absence of the other parties to the appeal, misled the court to issue orders that have been overtaken by intervening events and which cannot now be enforced.*
>
> *c) That the Court while allowing the appeal, granted the Appellant prayers (iii) and (iv) of the Memorandum of Appeal on terms*

that;

(iii) The Recognition Agreement dated 10th May, 2010

registered on 13th May, 2010 No. RCA 88 of 2010 he restored forthwith in the record and ongoing renewal negotiations of Collective Bargaining Agreement do proceed.

(iv) The Collective Bargaining Agreement dated 10th May, 2010 between the 1st Appellant and 1st Respondents be reinstated.

d) The said recognition agreement referred to in the Memorandum of Appeal lapsed on the 31st July, 2011. Subsequently the 1st Respondent) and 3rd Respondents (Claimant) on the strength of the orders of this court in ***Civil Application No 85 of 2013*** *negotiated and executed several Collective Bargaining Agreements and Recognition Agreements which have now been fully implemented.*

e) The Court of Appeal, in a ruling dated 26th July, 2013 in ***Civil Application No. 85 of 2013 National Union of Water & sewerage Employees & 3 others v Nairobi City Water & Sewerage Co. Ltd & Others*** *found that the actions sought to be stayed pending the hearing of* ***Civil Appeal No. 18 of 2013*** *had most certainly been overtaken by events.*

f) The Court of Appeal in its judgement appears to have incorrectly assumed that the Labour Relations Act had been repealed and that consequently Section 54 of the said statute was no longer applicable.

He avers that the issue of demarcation has therefore not been resolved and is pending until the Application at the Court of Appeal as espoused above is heard and determined. That the uncertainty surrounding conclusion of the CBA negotiations between Nairobi Water and KCGWU is causing tension likely to spark industrial action as the employees of Nairobi Water are of the view that any attempt to force them to participate in the activities of a union they have rejected over the last eight (8) years is unconstitutional.

Patrick avers that while KCGWU represents 98% of Nairobi Water's unionisable employees, NUWASE represents only 2% of the employees which consequently makes KCGWU the lawfully authorised Union to enter into CBA with Nairobi Water as provided by **Sections 4 and 54(1) of the Labour Relations Act, 2007** and **Articles 36 and 41 of the Constitution of Kenya.**

In support of its case that Nairobi Water employees ought to freely associate with Union of their choice in trade union activities, Patrick cites the decisions in **Nakuru Water and Sanitation Services co. Ltd v Mike Oluoch & 11 others [2009] eKLR**; **Scientific Research International Technical & Allied Workers Union v Kenya Agricultural Research Institute & Another [2013] eKLR**; and the Court of Appeal case of **Kenya Plantation and Agricultural Workers Union v Kenya Export Floriculture, Horticulture and Allied 'Workers' Union (Kefhau) represented by Its Promoters David Benedict Omulama & 9 others [2018] eKLR.** He prays that this Court dismisses NUWASE's application with costs.

NUWASE filed a Further Affidavit sworn by Elijah Otieno Awach who avers that KCGWU disobeyed the orders issued by the Court of Appeal and should be denied audience in this Court unless it purges the contempt and or fully obeys the superior court order. He avers that the application by NUWASE is purely for enjoinment which if allowed then NUWASE will file an application for contempt of court proceedings against KCGWU and Nairobi Water

NUWASE's (Applicant) Submissions

The Objector/Applicant submits that the issue of *Locus Standi* in *Limine* does not arise because the Recognition Agreement between the Applicant and Nairobi Water was never terminated by the parties and is thus still valid and binding.

NUWASE cites the case of **HCC No. 1 of 2017; Wilmot Mwadilo & 3 Others v Eliud Timothy Mwamunga and One Other** where the court held that upholding the preliminary objection at that stage would be draconian as subjective issues that had emerged needed to be heard and determined at the time of hearing of the notice of motion application. NUWASE submits that for these reasons KCGWU's Notice of Preliminary Objection dated 10th March 2020 is not merited and should be dismissed with costs to NUWASE while its application dated 24th February 2020 is allowed as prayed.

KCGWU's Submission

KCGWU submits that NUWASE has neither sought leave to be enjoined as such nor has the Court enjoin it to the purported suit and that there is therefore no proper suit or application before Court for this Court to make a determination on the issue of joinder. It cites **Black's Law Dictionary 9th Edition at page 132** which defines an interested party as *a party who has a recognizable stake (and therefore standing) in the matter*. KCGWU relies on **High Court Nairobi Civil Case No. 100 of 2016; Yusuf Abdi Adan & another v Hussein Ahmed Farah & 3 others [2016] eKLR** where the court held that a party cannot have the *locus standi* to address the court until and unless they are properly on record or a party to the suit.

KCGWU further cites the Supreme Court's decision in **Nairobi Petition No. 1 of 2017; Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others & Michael Wainaina Mwaura (as Amicus Curiae) [2017] eKLR** which set out the elements applicable in enjoinment of an interested party in proceedings. That is: an interested party has to demonstrate a direct interest or stake in the case even though they were initially not a party to the cause and that an interested party is one who will be affected by the decision of the court or who feels their interest will be well articulated if they themselves appear in the proceedings.

It submits that a collective agreement functions as a labour contract between an employer and a union preceded by negotiations between their representatives. Further, that the court in **BIFU v Maisha Bora Sacco Society Limited, Cause No. 2298 of 2014** held that a recognition agreement, like a contract, sets out how the relationship between the parties is to be governed and is by mutual consent of the parties. That NUWASE is therefore a stranger to the CBA between KCGWU and Nairobi Water and is thus estopped from challenging registration of the same.

It is submitted by KCGWU that NUWASE has premised its application on Rule 17 of the Employment and Labour Relations Court (Procedure) Rules on interlocutory applications and temporary injunctions and that from the face of it the said orders cannot issue as they are overtaken by events. That this is because the court cannot stop or bar negotiations which have already been concluded and further halt what is statutorily provided for, such as deduction and remittance of union dues under **section 48(1) and (2) of the Labour Relations Act**. Further, that the authority to deduct and remit union dues is based on Form S and not the recognition agreement and therefore arbitrarily stopping the same is irregular and unlawful. That the standard of proof in mandatory injunctions is higher than that in prohibitory injunctions. It cites the case of **Kenya Breweries Ltd & Another v Washington O. Okeyo [2002] EA 109** where the Court of Appeal stated that a mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and in the clearest of cases.

KCGWU submits that because there is no main suit, there is need to look at the elements/threshold for grant of injunctive orders. It refers the court to the definition of a prima facie case as discussed in **Mrao Ltd. v First American Bank of Kenya & 2 Others (2003) KLR** cited with approval by the Court of Appeal in **Moses C. Muhia Njoroge & 2 others v Jane W Lesaloi & 5 Others [2014] eKLR**. That an applicant seeking injunction must disclose all relevant facts and also show he has a legal or equitable right which requires protection by injunction, as was held in **Kenlab Cons Ltd v New Gatitu Service Station Ltd & Another [1990] eKLR**.

It further relies on the case of **Paul Gitonga Wanjau v Gathuthis Tea Factory Company Ltd & 2 others [2016] eKLR** where the court expressed itself on the issue of balance of convenience and submits that if the injunction is granted, greater hardship will be inflicted on KCGWU which has waited for 4 years to negotiate its members' employment terms and sign a CBA. That since it stands to suffer more than the Objector (NUWASE), the balance of convenience tilts in its favour.

It is the submission of KCGWU that NUWASE cannot wait until the rightful parties herein agree and then illogically raise non issues wasting the Court's time. Further, that it is not this Court's duty to breathe life into an application brought on conflicting provisions of the law which do not serve the purpose or remedy sought from court. It submits that NUWASE's application is a clear abuse of court process and that NUWASE should not go unpunished. It cites **JR Division Misc. Civil Application No. 685 of 2017, Satya Bhama Gandhi v DPP & 3 others [2018] eKLR** where the court enumerated situations when abuse of court process arises being: "*where there is no law supporting a court process or where it is premised on recklessness such as the abuse lies in the inconvenience and inequalities involved in the aims and purposes of the action*."

KCGWU further submits that this is a proper case for the court to consequently order NUWASE to pay costs seeing that it is guilty of misconduct. That such power is based upon the court's inherent authority to control its process and persons coming before it.

Analysis and Determination

In the celebrated case of **Mukisa Biscuits Manufacturing Co.Ltd v West End Distributors (1969) EA 696**, the court defined a preliminary objection thus:

> "*…a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.*"

In the application dated 24th February 2020, the Objector has sought various interlocutory orders but states in its Further Affidavit sworn by Elijah Otieno Awach that the said application is purely for enjoinment. KCGWU has submitted that since NUWASE did not seek leave to be enjoined, it is not properly on record and consequently lacks the *locus standi* to address this Court citing the Supreme Court in **Raila Amolo Odinga & another v IEBC & 2 others & Michael Wainaina Mwaura (as Amicus Curiae) [2017] eKLR** referred to paragraph 37 in the case of **Francis Karioki Muruatetu & Another v Republic & 5 others Petition 15 as consolidated with 16 of 2013 [2016] eKLR** in which the court stated that:

> "*One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court…*"

I do not agree with the Union. These are not normal proceedings and the Objector in its application does not seek to be enjoined as a party as there is no suit before this court for its enjoinment. The Objector has come to court to object to the Registration of the CBA. An Objector does not require to seek leave to be enjoined to proceedings, but is entailed to be heard as of right. The court does not have a discretion but must hear the Objector and determine whether or not the objection is valid.

For these reasons, I find that the preliminary objection by KCGWU is misplaced as the nature of the issues before the court are matters of fact which the court must establish upon hearing the parties. Preliminary objections by definition can only be raised on matters of law. **The preliminary objection is therefore without merit and is dismissed.**

Turning to the substantive issues raised in the objection, there is no contention that the issue of recognition between KCGWU and Nairobi Water has been the subject of several disputes that have been determined by this court, its predecessor the Industrial Court and the Court of Appeal.

Indeed, KCGWU has admitted the averments by NUWASE that the last decision of the Court of Appeal reinstated the recognition agreement between NUWASE and Nairobi Water. In the judgment of the Court of Appeal delivered on 16th February 2018 in **Nairobi Civil Appeal No. 18 of 2013 between National Union of Water and Sewerage Employees and 3 Others v Nairobi Water and Sewerage Company (1st Respondent), Nairobi City Council (2nd Respondent), Kenya Local Government Workers Union (KLGWU) now KCGWU (3rd Respondent) and Association of Local Government Employers (4th Respondent),** the court listed previous disputes between the parties. An excerpt from the judgment is set out below –

This is an appeal from a ruling of Nzioki Wa Makau, J. dated the 13th day of December, 2012.

*The background to the appeal is that, the appellants filed **Industrial Court Cause No. 823/2012**, against the respondents dated the 18th day of May, 2012 and amended on the 21st day of May 2012. The cause was resisted by the 1st respondents' defence dated 15th day of June 2012 and that of the 2nd respondent dated 29th day of May 2012. The appellants joined issue with the respondent defences vide their replies thereto dated, the 22nd day of October 2012.*

On the 7th day of August 2012, the first respondent filed a list dated 6th day of August 2012, containing what it termed as similar matters as the cause filed by the appellants against it, namely;

1. INDUSTRIAL CAUSE NO. 1648/2011- NATIONAL UNION OF WATER & SEWERAGE EMPLOYEES V/S NAIROBI CITY WATER AND SEWERAGE COMPANY LIMITED.

- Memorandum of claim dated 26th September, 2011

- Statement of response dated 26th January, 2012

2. INDUSTRIAL CAUSE NO. 90/2011- NATIONAL UNION OF WATER & SEWERAGE EMPLOYEES V/S NAIROBI CITY WATER AND SEWERAGE COMPANY LIMITED.

- Notice of motion Application dated 25th January, 2011

- Memorandum of defence dated 22nd February, 2011

3. INDUSTRIAL CAUSE NO. 2133/2011- NATIONAL UNION OF WATER & SEWERAGE EMPLOYEES V/S KENYA LOCAL GOVERNMENT WORKERS UNION & NAIROBI CITY WATER

AND SEWERAGE COMPANY LIMITED.

- Memorandum of claim dated 21st December, 2011

- Notice of motion Application dated 21st December, 2011

- Replying affidavit by Respondent, sworn by Boniface M. Munyao dated 30th January, 2012.

- Replying affidavit by interested party, sworn by Ivy Nyarango dated 1st March, 2012.

4. HCCC NO. 784 OF 2004- PETER NJIHIA NJOROGE & 2200 OTHERS VS. THE CITY COUNCIL OF NAIROBI AND NAIROBI CITY WATER AND SEWERAGE COMPANY LIMITED.

- Plaint and verifying Affidavit dated 20th July, 2004.

5. HC MISC. APP. NO. 57 OF 2011- REPUBLIC V/S THE INDUSTRIAL COURT OF KENYA, NATIONAL UNION OF WATER & SEWERAGE EMPLOYEES AND NAIROBI CITY WATER AND SEWERAGE COMPANY LIMITED.

Exparte Applicant. Kenya Local Government Workers Union.

- Notice of Motion Application dated 1st April, 2011.

- Order of the court dated 18th March, 2011.

6. HC MISC APP. NO. 30 OF 2011- REPUBLIC V/S THE INDUSTRIAL COURT OF KENYA, NATIONAL UNION OF WATER & SEWERAGE EMPLOYEES, WATER PROVIDERS ASSOCIATION AND WATER COMPANY, ECONOMIC PLANNING DIVISION MINISTRY OF LABOUR, AND ASSOCIATION OF LOCAL GOVERNMENT EMPLOYEES

Exparte Applicant. Kenya Local Government Workers Union

- Order dated 2nd March, 2011.

7. INDUSTRIAL CAUSE NO. 399/2012- NATIONAL UNION OF WATER & SEWERAGE EMPLOYEES V/S NAIROBI CITY WATER AND SEWERAGE COMPANY LIMITED."

The Court allowed the appeal and set aside the decision of this court in **Industrial Court Cause No. 823 of 2012**. There is therefore no dispute that the position currently obtaining is that subsisting before the ruling of this court of 13th December 2013 which was the subject of the appeal. That position was as set out in this court's Ruling delivered on 22nd November 2019 in **Cause No. 755 of 2013 as consolidated with causes 2133 of 2011, 823A of 2012 and 2504 of 2012, 2020 of 2012, 2062 of 2012 and 1526 of 2013, 1007 of 2017, 977 of 2017 and 2107 of 2016 between National Union of Water and Sewerage Employees v Nairobi City Water and Sewerage Company Limited (1st Respondent), Kenya County Government Workers Union (2nd Respondent), The Registrar of Trade Unions (3rd Respondent), Elijah Otieno Awach (4th Respondent) & The Attorney General (5th Respondent).**

In the ruling, I observed as follows –

The gravamen of the dispute between NUWASE and KLGWU is historical. Originally, KLGWU was the only union representing local government workers. The Water Act 2002 proposed the transfer of water services from local authorities to water companies in order to improve water management. The water companies were formed as separate legal entities following the enactment of the Act. Since water and sewerage services were previously provided by local authorities, all staff working in the departments were members of KLGWU.

Upon separation of the water companies for the local governments, employees of the water companies formed their own union which was registered as NUWASE.

In a ruling of the (then) Industrial Court in C.A. No. 213 of 2010, the court directed KLGWU to delete the phrase "and the councils' water companies" from clause 1 of its CBA. This position was upheld in Cause No. 439 of 2010 where the Industrial Court again held that NUWASE was the appropriate union for employees of water companies and restrained the KLGWU from purporting to represent on holding itself out as an agent of the employees, recruiting or

dealing with employees of water companies in any manner.

These decisions were upheld in the Court of Appeal in Civil Appeal No 18 of 2013.

From the foregoing, it is my opinion that demarcation disputes between NUWASE and KLGWU now County Government Workers Union have been resolved and all cases involving the two parties on the subject of demarcation are therefore redundant. These include Cause No. 2133 of 2011, cause No. 823A of 2012, Causes No. 2020 of 2012, Cause No. 2062 of 2012, Cause No. 1526 of 2013 and any other suits involving demarcation between the two unions. The said files should therefore be marked as closed as the issue has been put to rest."

Both KCGWU and Nairobi Water, having been parties in the ruling, are aware of and are bound by the decision therein. The same has not been reviewed or set aside and neither has the same been challenged in any court. The same therefore remains valid to date.

Further, both Nairobi Water and KCGWU have informed the Court that –

"Following delivery of the judgement, the Respondent filed another motion dated 19th December, 2018 seeking a review order which is still pending. The Motion is founded on the following grounds;

a) Civil Appeal No 18 of 2013 proceeded for hearing on 26th April, 2017 in the absence of all the Respondents.

b) The Appellants, in the absence of the other parties to the appeal, misled the court to issue orders that have been overtaken by intervening events and which cannot now be enforced.

c) That the Honourable Court while allowing the appeal, granted the Appellant prayers (iii) and (iv) of the Memorandum of Appeal on terms that;

(iii) The Recognition Agreement dated 10th May 2010 registered on 13th May, 2010 No. RCA 88 of 2010 be restored forthwith in the record and ongoing renewal negotiations of Collective Bargaining Agreement do proceed.

(iv) The Collective Bargaining Agreement dated 10th May, 2010 between the 1st Appellant and 1st Respondents be reinstated.

d) The said recognition agreement referred to in the Memorandum of Appeal lapsed on the 31st July, 2011. Subsequently the 1st Respondent and 3rd Respondents (Claimant) on the strength of the orders of this court in Civil Application No 85 of 2013 negotiated and executed several Collective Bargaining Agreements and Recognition Agreements which have now been fully implemented.

e) The Court of Appeal, in a ruling dated 26th July, 2013 in ***Civil Application No. 85 of 2013 National Union of Water & sewerage Employees & 3 others vs Nairobi City Water & Sewerage Co. Ltd & Others*** *found that the actions sought to be stayed pending the hearing of Civil Appeal No. 18 of 2013 had most certainly been overtaken by events.*

f) The Court of Appeal in its judgement appears to have incorrectly assumed that the Labour Relations Act had been repealed and that consequently Section 54 of the said statute was no longer applicable."

In the judgment of the Court of Appeal in Appeal No. 18 of 2013, the Court set aside the orders made by this Court on 13th December 2013 together with all consequential orders. One of the consequences of the ruling of this court dated 13th December 2013 was that it cleared the way for Nairobi Water Company and KCGWU to enter into a recognition agreement and collective bargaining agreement.

In the ruling, the Court made a determination that *"The Kenya Local Government Workers Union is the appropriate union for the employees of Nairobi City Water and Sewerage Company Limited."*

This was the decision set aside by the Court of Appeal in the ruling of 16th February 2018. The obtaining position is therefore that stated in the decision of the (then) **Industrial Court in C.A No. 213 of 2010** and upheld in **Cause No. 439 of 2010 to the effect that KLGWU** (now KCGWU) should delete the phrase *"and the Councils' Water Companies"* from its CBA and that NUWASE was the appropriate union for employees of Water Companies. In Cause 439 of 2010, the Court specifically restrained KLGWU from purporting to represent or hold itself out as an agent of the employees, recruiting or dealing with employees of water companies in any manner.

From the foregoing, it is clear that the recognition agreement dated 18th February 2013 between KCGWU and Nairobi Water and Sewerage Company Limited was in violation of the explicit decisions of this court in **Cause 439 of 2010** and **CA No. 213 of 2010.** The same was therefore null and void. The subsequent CBA registered as RCA No. 224 of 2015 which was consequent upon the said recognition agreement is therefore also tainted.

However, in view of the fact that the Court of Appeal decision was made on 16th February 2018 after the said CBA had long been registered and implemented and taking into account the provisions of Section 59 of the Labour Relations Act and specifically sub section 59(3) and (5) thereof which provide that the terms of collective bargaining agreements take effect on the date of registration and become incorporated into the contract of every employee covered by the collective agreement, the collective agreement registered as RCA No. 224 of 2015 is now water under the bridge.

In their submissions, both KCGWU and Nairobi Water Company have relied heavily on the membership of the employees of the Company to the union which is alleged to be at 98% or 99.9%. This may or may not be the case as no evidence was produced of the total number of Nairobi Water's unionisable employees or members of NUWASE to enable this court verify this as a fact. However, membership alone is not the determinant for recognition. Section 54(8) of the Labour Relations Act provides that where there is a dispute over recognition the court shall take into account the sector in which the employer operates. The employer herein the Nairobi Water and Sewerage Company operates in the Sector covered by the NUWASE.

It does not operate under the County Governments which is covered by KCGWU. Further, as already observed, the Court in **Cause 439 of 2010** and in **C.A. 213 of 2010** directed the KCGWU to remove water companies from its area of operation. In view of the confirmation of these decisions by the Court of Appeal decision in **Civil Appeal No. 18 of 2013**, the KCGWU has no right to cover employees in the water services sector. It can therefore not represent the employees in that sector. This does not violate the freedom of association under Article 36 of the Constitution or the right to join a union of choice in Articles 41 of the Constitution. The fact that an employee has a right to join a union does not mean that he can join a union whose membership clause does not cover the sector in which he works. What it means is that the employee has a right to join the right union or the right not to belong to the right union. In deed the wording of Article 41(2)(c) is that every employee has a right ***"to form, join or participate in the activities and programmes of a trade union".*** The Constitution does not state that it can be any trade union but *"a trade union"* meaning that it must be a relevant trade union. This is what the Labour Relations Act provides for. This is also why every union is required to have a membership clause that defines who can join its membership. An employee in the water and sewerage sector cannot for example join a trade union covering university lecturers, or agricultural sector because it has freedom to join any union of his choice.

KCGWU must respect the unchallenged determination of this court that it is not the correct or proper union for employees of the water sector where the Nairobi Water and Sewerage Company operates. It must also respect the unchallenged decision of this court as confirmed by the Court of Appeal and expunge employees of water and sewerage companies from the membership clause of its Constitution.

NUWASE also raised the issue that the recognition agreement it signed with Nairobi Water Company is still in place. This is not contested. This being the case, it is the right union to enter into a collective agreement with Nairobi Water. It was thus fallacious to enter into a second recognition agreement with KCGWU when the recognition agreement with NUWASE was still in force. The recognition agreement between Nairobi Water and NUWASE which has been exhibited by NUWASE as Appendix 1 in the affidavit of ELIJAH OTIENO AWACH sworn on 24th February 2020 at Clause 2(1) thereof states that it shall recognise NUWASE as the *"Sole Labour Organisation representing the interests of unonisable workers who are in the employment of the company in all negotiable matters*".

The company therefore had no capacity to enter into another recognition agreement with KCGWU during the pendency of the recognition agreement with NUWASE.

For the foregoing reasons, I find merit in the application dated 24th February 2020 filed by NUWASE. I thus decline to register the CBA between Kenya County Government Workers Union and Nairobi City Water and Sewerage Company Limited on grounds that the CBA was negotiated without capacity and in violation of the unchallenged decisions of this court in Cause 439 of 2010 and CA No. 213 of 2010 as confirmed by the Court of Appeal in Civil Appeal No. 18 of 2013.

There shall be no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF JANUARY 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE