



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. E095 OF 2021 (CONSOLIDATED WITH CAUSE NO. E083 OF 2021)

CHRISTINE SONGA.....CLAIMANT

VERSUS

KENYA COUNTY GOVERNMENT WORKERS' UNION.....1ST RESPONDENT

REGISTRAR OF TRADE UNIONS.....2ND RESPONDENT

AND

MATILDA JEBET KIMETO.....INTERESTED PARTY

RULING

1. Causes Nos. E083 of 2021 and E095 of 2021 were consolidated by consent of parties on 24/2/2021 on the basis that there are common questions of law. The two challenge the union elections conducted on 5/2/2021.

2. On 15/1/2021, Hon. Lady Justice Maureen Onyango delivered a ruling in Collective Bargaining Agreement (CBA) No. 34 of 2020 in which the Hon. Judge ordered:-

“That the registration of the Collective Bargaining Agreement between Kenya County Government Workers’ Union and Nairobi City Water and Sewerage Company Limited on grounds that the Collective Bargaining Agreement was negotiated without capacity and in violation of the unchallenged decisions of this Court in Cause No. 439 of 2010 and C.A. No. 2013 of 2010 as confirmed by the Court of Appeal in Civil Appeal No. 18 of 2013 is hereby declined.”

3. The applicant filed Notice of Motion Application dated 8/2/2021 on certificate of urgency and was heard ex parte by Hon. Nzioki Wa Makau J. The Judge issued interim orders staying and/or suspending any decisions, proceedings and resolutions made during, after or as a result of the 5/2/2021 elections pending the hearing and determination of the application.

4. The applicant now seeks confirmation of this Order pending the hearing and determination of the suit.

5. Further Orders sought at the interparties stage are as follows: -

(e) The honourable Court be pleased to issue an interlocutory order quashing any decisions, proceedings and resolutions made during or as a result of the 5/2/2021 elections pending the hearing and determination of the suit.

6. Prayers (a) (b) and (d) are spent.

7. Application dated 2/2/2021 in Cause No. E083 /2021 came for Ex parte hearing before me on 4/2/2021 seeking to stop the conduct of the Elections by the Kenya County Government Workers’ Union, for the Nairobi City Water and Sewerage Company Limited that were scheduled for 5/2/2021. The Court did not grant interim orders and so the Elections proceeded as scheduled on 5/2/2021.

8. This application is therefore spent and the issue at hand is to stop implementation of the impugned Elections by registering the elected officials as sought in the application dated 8/2/2021. Resolution of this application will resolve the interim issues in the consolidated suit.

9. The application dated 8/2/2021 is premised on grounds set out on the face of the Notice of Motion and in the supporting affidavit of one

Christine Songa which may be summarized as follows:-

10. On 15/1/2021, Maureen Onyango, J. delivered a ruling dated 15/1/2021 in which the Court declined to register an impugned Collective Bargaining Agreement No. 34 of 2020 between the 1st respondent and Nairobi Water and Sewerage Company Limited aforesaid.

11. The Court was emphatic that the proper trade union for the purpose of representing employees of Nairobi Water and Sewerage Company Limited, and indeed all employees in the Water Sector, is National Union of Water and Sewerage Company Employees.

12. The Court went further and directed the 1st respondent to proceed and forthwith expunge all employees of water sector from its register and delete the clause in its Constitution that permits the 1st Respondent to represent employees in the Water Sector.

13. The Court ruled at paragraph 28: –

"KCGWU must respect the unchallenged determination of this Court that it is not 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."

14. That the issue of the proper union at the Nairobi Water and Sewerage Company Limited, and the Lack of capacity by the 1st respondent to represent the said employees is settled and beyond peradventure.

15. That despite the unequivocal pronouncement by the Court, the 1st Respondent on 5/2/2021 proceeded to conduct elections for branch officials of Nairobi Water and Sewerage Company Limited and in brazen defiance of the Court Order.

16. That despite numerous letters to the Secretary General of the 1st respondent seeking to have him remove the employees of Nairobi Water and Sewerage Company from its register and in the union constitution, he has refused to make the 1st Respondent comply with the ruling of the Court.

17. That the election was therefore illegal, a nullity in law and a waste of resources. That the results of the elections held on 5/2/2021 be suspended pending the hearing and determination of the suit.

18. On 22/3/2021, the Court made the following directions in the consolidated suit:-

"That the respondents to file replying affidavit by close of business on 24/3/2021. That the applicants to file supplementary affidavit and submissions by close of business on 26/3/2021 and respondents to file submissions by close of business on 30th March, 2021. That mention for ruling date be before the duty judge on 31/3/2021. That interim orders be and are hereby extended."

19. Meanwhile, I proceed on annual Leave due to end on 15/5/2021.

20. On 12/4/2021, the matter was mentioned before Maureen Onyango, J. and the Judge made the following Order:-

"Judgment will be delivered on notice before 30th April, 2021. Trial court will make a determination of the application of intended interested party."

21. The file has been placed before me for determination at home.

22. The intended interested party, Matilda Jebet Kimeto filed an application dated 29/3/2021 on 31/3/2021.

23. The Chamber Summons application under a Certificate of Urgency prays that same be certified urgent and that Notice of Motion Application dated 26/3/2021 be heard during vacation.

24. The purported notice of motion application dated 26/3/2021 is not attached to the Chamber Summons application before me and so the Court is unable to deal with the issue of joinder of the interested party, there being no application for consideration in the file. The Court is not certain to what or whom this omission is attributed to in this era of E-filing where there is often delay in uploading documents duly filed and making copies for the file. The parties had agreed that the application herein be determined before 30/4/2021 otherwise, it will be overtaken by events. I must in the circumstances proceed to determine the same.

25. The 1st respondent filed a replying affidavit sworn to by Roba S. Duba, General Secretary of Kenya County Workers' Union on 25/3/2021.

26. The Secretary General deposes that the employees of Nairobi Water and Sewerage Company Limited are members of the 1st respondent who adhere to the requirements of membership including payment of the union dues.

27. That the elections of the Nairobi Water and Sewerage Company Limited are conducted in accordance with the Union's Constitution.

28. That the workers have freedom of association and the right to choose which union to belong to. That the 1st respondent is the lawful representative of these workers
29. That Nairobi water and Sewerage Company LTD is part of Government and its shareholding is held by the Nairobi City Government and it discharges a fundamental County role hence there is no distinction between a County government and the Water and Sewerage Company.
30. That the decision cited on registration of Collective Bargaining Agreement, CBA no. 34 of 2020 has no impact in the intended elections since it was dealing with the single issue of Collective Bargaining Agreements. Therefore, this decision cannot be used to stop an election.
31. In any case, the issue of elections is an internal issue to be handled between the Union and the Registrar of Trade Unions and the Court has no jurisdiction over the matter before such issues are raised before the Registrar.
32. That the Court did not stop holding of elections and so the 1st respondent is not in defiance of a Court order.
33. That the applicant is guilty of laches since she has approached the Court after the election has been conducted, and she knew the elections involved workers of the Nairobi Water Company.
34. *“That this Court has no power to enforce the decision of Hon. Justice Maureen Onyango. If the Applicants feel that Order has been disobeyed the best approach is to go before the Judge for contempt and not institute another case.”*
35. That the Court has no power to force employees of Nairobi Water to Join the National Union of Water and Sewerage Employees. That the application be dismissed with costs.
36. The Registrar of Trade Unions filed a replying Affidavit and sworn to by E.N. Gicheha, the Registrar, on 22/3/2021 and a further affidavit in which she deposed and reiterated that the supporting affidavit of the applicant is riddled with falsehoods, misstatements and non-disclosure of material facts with the intention of misleading the Court.
37. That the Registrar has the mandate of registering trade unions and to direct the conduct of union elections. That the Registrar directed all unions to hold elections between 4th January and 3rd June, 2021 by a letter dated 5/9/2020.
38. That in compliance with the said circular, Nairobi City Water and Sewerage Company held its elections on 5/2/2021. The elections were supervised by the Ministry of Labour officials and results communicated to the Registrar of Trade Unions by a letter dated 8/2/2021.
39. That the 1st respondent is yet to lodge the notice of change of names of the officers/officials Vide Form Q with the Registrar of Trade Unions and in the absence of Form Q the Registrar cannot effect any changes.
40. That Article 41 of the Constitution of Kenya provides for the right of every person to join a union of choice and participate in the activities and programs of the union of choice. Furthermore, Article 36(1) and (2) guarantee every person freedom of association which includes the freedom to join and participate in the activities of an association of choice.
41. That the business of establishing branches is the responsibility of the 1st respondent who has established twenty-two Water Company branches some of which have conducted elections but the claimant is only interested in the Nairobi City Water and Sewerage Company Limited, which action is based on malice.
42. That the 1st respondent is the lawful union representing Workers of Nairobi Water Company Limited and the claimant is a paid up member of the 1st respondent.
43. *“That there are two union representing the employees of the Nairobi City Water and Sewerage Company Limited and the right to decide which union to join is an individual decision but according to the ruling of the Court in Collecting Bargaining Agreement No. 34 of 2020 the Kenya County Government Workers Union cannot negotiate for them.”*
44. The 2nd respondent therefore has no mandate to interfere with Union membership.
45. That the claim and application has no basis and it be dismissed.
46. All parties filed written submissions and the issues for determination are as follows: -

(a) Whether the Claimant/Applicant has satisfied the requirements for grant of an interim injunction pending the hearing and determination of the suit on the merits.

(b) Whether the applicant is entitled to any other relief at this stage of the proceedings.

47. In Collective Bargaining Agreement No. 34 of 2020, Kenya County Government Workers’ Union –vs- Nairobi Water and Sewerage Company Limited and National Union of Water and Sewerage Employees [2021] eKLR, Hon. Maureen Onyango, J. held

“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 company from the membership clause of its Constitution.”

48. It is not in dispute that Nairobi Water and Sewerage Company Limited has a Recognition Agreement with National Union of Water and Sewerage Employees (NUWASE).

49. It is also not in dispute that Nairobi Water and Sewerage Company went ahead to sign a second Recognition Agreement with KCGWU when the Recognition Agreement with NUWASE was in force. The two agreements are in respect of same employees.

50. It is common cause that the demarcation dispute between the two unions (NUWASE) and (KCGWU) has been determined by the Courts as discerned from the unchallenged ruling of Maureen Onyango, J. dated and delivered on 15/1/2021 in which the learned judge stated at page 28 and 29 of the Ruling thus: -

“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 Collective Bargaining Agreement (CBA) between Kenya County Government Workers Union and Nairobi City Water and Sewerage Company Limited on grounds that the Collective Bargaining Agreement was negotiated without capacity and in violation of the unchallenged decisions of this Court in Cause 439 of 2010 and C.A. No. 213 of 2010 as confirmed by the Court of Appeal in Civil Appeal No. 18 of 2013.”

51. The officials of the Kenya County Government Workers Union (KCGWU) despite knowledge of this ruling by the Court and the decision of the Court of Appeal aforesaid, went ahead with assistance of the 2nd respondent, Registrar of Trade Unions to conduct Branch elections at the Nairobi Branch of the 1st respondent.

52. It is apparent from the submissions of the Secretary General of the 1st respondent Roba Duba that 1st respondent has taken the erroneous view expressed also supported by the 2nd respondent that the decision of Maureen Onyango, J. in Collective Bargaining Agreement (CBA) No. 34 of 2020 has no impact in their elections because it deals with the single issue of the Collective Bargaining Agreement.

53. The 1st respondent goes further to espouse the erroneous, and contemptuous view that this Court has no power to enforce a decision of Hon. Maureen Onyango, J. in the aforesaid ruling.

54. If this is not an expression of willful intent to defy lawful orders of this Court without making any effort to have the said orders set aside or stayed pending appeal, I do not know what it is.

55. What is more surprising is the attitude taken by the Registrar of Trade Unions in his replying affidavit that he has understood the application before Court but he has no authority and mandate to interfere with Union membership and amendment of Union Constitution.

56. By this statement, the Registrar was willing to countenance conduct of elections by the 1st respondent in a constituency where the 1st respondent was expressly directed by Employment and Labour Relations Court and the Court of Appeal in two different decisions to refrain from operating in and to amend its constitution to implement the directive of the Court of Appeal and subsequently by Employment and Labour Relations Court.

57. The Registrar proffered Section 34 of the Labour Relations Act; Article 36 and 41 of the Constitution of Kenya as justification for the 1st respondent to conduct elections in open defiance of Court orders that have not been set aside nor stay orders granted in respect of.

58. The Registrar further justified conduct of the elections in contempt of court orders because other County Water Services Branches had already conducted their elections despite the Court edict to the 1st respondent to stop negotiating for and remove from its Constitution the clause allowing 1st respondent to represent Water Services cadre.

59. The Registrar also blames the applicants for failing to object to the participation of the 1st respondent in the County Water Services cadre immediately, the Registrar issued 21 days' notice of conduct of elections and same notice was published in the daily newspapers and Kenya Gazette.

60. The Registrar cites Employment and Labour Relations Court case of **David K. Songok and 8 Others –vs- Kenya Electrical Traders and Allied Workers Union and 11 Others [2021] eKLR** where Maureen Onyango J. stated: -

“The timing of the filing of these petitions is also not lost to the Court. The petitioners had the opportunity to appeal the Court order immediately after notice for elections was issued on 26th November, 2020 but they waited until just a couple of days before the elections to come to Court.”

61. Granted the applicant ought to have come to Court earlier, but does that delay in itself justify contemptuous conduct of the 1st respondent in not amending its constitution as directed by the Courts and defiantly proceeding to conduct elections in a constituency it has been lawfully ordered to refrain from representing?

62. The principles for grant of injunctive orders are stated in the case of **Giella –vs- Cassman Brown Limited 1973 E.A 358** as follows: -

- (a) An applicant must show *prima facie* case with a probability of success.
- (b) If the temporary injunction is not granted, the applicant stands to suffer irreparable harm for which damages would not be an adequate remedy.
- (c) If the Court is in doubt as to whether the Applicant stands to suffer irreparability, then it will determine the application on balance of convenience.

63. Upon a careful consideration of the relevant facts and the law applicable in this matter, while refraining from making a final determination of the facts on the merit- See **Mary Ariviza and Okoth Mondoh –vs- Attorney General Kenya and Secretary General of E.A.C. Appl. No. 3 of 2010, 2005-2013 EALS P.1**, if the Court allowed registration of the elected officials in circumstance which *prima facie* appear to be contemptuous of lawful Court orders, the rule of law would not only suffer a self -inflicted blow but the applicants would also be prejudiced in a manner that cannot be remedied by an award of damages.

64. There is something to be said about all stakeholders to put in place a comprehensive framework for the conduct of union elections which occur every five (5) years. This framework ought to imitate one guiding the steps and the time lines in the Elections Act 2011 as amended with regard to national elections for effective and expeditious resolution of emerging disputes before and after the conduct of elections starting from the time the Registrar of Trade Unions publishes notices for the conduct of union elections to the time the Registrar receives the list of elected officials for placement in the official register of elected Union officials.

65. This, if done will bring order and sanity in the conduct of union elections and in particular in orderly resolution of any emerging disputes.

66. Having said that the Court finds that: -

In this particular case, the application has merit and is allowed.

The Court makes the following orders: -

- (a) An interlocutory injunction is issued staying the decisions, proceedings and resolutions made pursuant to the Union elections conducted on 5th February, 2021 with respect to the 1st respondent and the Employees of Nairobi City Water and Sewerage Company Limited pending the hearing and determination of this suit.
- (b) The main suit to be fixed for hearing on a priority basis and it be concluded within the shortest time possible.
- (c) Costs in the Cause.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF APRIL, 2021.

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. 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 18 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.

MATHEWS N. NDUMA

JUDGE

Appearances

James Oketch & Co. Advocates for the Applicant

Mathenge Mwiti Advocates for 1st respondent

Office of the Attorney General for 2nd respondent

Conrad Maloba and Associates for the intended interested party