



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 755 OF 2013**

**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**

*(Before Hon. Lady Justice Maureen Onyango)*

**NATIONAL UNION OF WATER AND SEWERAGE EMPLOYEES.....APPLICANTS**

**VERSUS**

**NAIROBI CITY WATER AND**

**SEWERAGE COMPANY LIMITED.....1<sup>ST</sup> RESPONDENT**

**KENYA COUNTY GOVERNMENT WORKERS UNION.....2<sup>ND</sup> RESPONDENT**

**THE REGISTRAR OF TRADE UNIONS.....3<sup>RD</sup> RESPONDENT**

**ELIJAH OTIENO AWACH.....4<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT**

**RULING**

There are several causes filed in this court relating to the parties herein. Some of them that have been brought to the court's attention are:-

**1. Cause 2133 of 2011,**

National Union of Water and Sewerage Employees..... Claimant

*Versus*

Kenya County Government Workers Union (KCGW)..... 1<sup>st</sup> Respondent

Nairobi City Water and Sewerage Company Limited..... 2<sup>nd</sup> Respondent

Elijah Otieno Awach..... 3<sup>rd</sup> Respondent

George Olwalo..... 4<sup>th</sup> Respondent

Jane Onyango..... 5<sup>th</sup> Respondent  
Nancy Siahi..... 6<sup>th</sup> Respondent  
Fred Evalia Buluku..... 7<sup>th</sup> Respondent  
Charles Makini..... 8<sup>th</sup> Respondent  
Matilda Jebet Kimetto..... 9<sup>th</sup> Respondent  
Moses Onditi Kaguru..... 10<sup>th</sup> Respondent  
Philip Charles Anyango..... 11<sup>th</sup> Respondent  
Mariam A. Bilali Arick's..... 12<sup>th</sup> respondent  
Jane Njeri Mwangi..... 12<sup>th</sup> respondent  
Benard Ndungu Mbugua..... 13<sup>th</sup> respondent

**2. Cause 823A of 2012 consolidated with Cause No. 2504 of 2012**

National Union of Water and Sewerage Employees..... 1<sup>st</sup> Claimant  
Rufus Olefa Osotsi..... 2<sup>nd</sup> Claimant  
Philemon Otieno Atik..... 3<sup>rd</sup> Claimant  
Ann Burugu..... 4<sup>th</sup> Claimant

*Versus*

Nairobi City Water and Sewerage Company Limited..... 1<sup>st</sup> Respondent  
Nairobi City County Government..... 2<sup>nd</sup> Respondent  
Kenya County Government Workers Union (KCGW)..... 3<sup>rd</sup> Respondent  
Association of County Government Employers (ACGE)..... 4<sup>th</sup> Respondent

**3. Cause 2020 of 2012**

National Union of Water and Sewerage Employees..... 1<sup>st</sup> Claimant  
Rufus Olefa Osotsi..... 2<sup>nd</sup> Claimant  
Philemon Otieno Atik..... 3<sup>rd</sup> Claimant  
Ann Burugu..... 4<sup>th</sup> Claimant

*Versus*

Nairobi City Water and Sewerage Company Limited..... 1<sup>st</sup> Respondent  
Nairobi City County Government..... 2<sup>nd</sup> Respondent  
Kenya County Government Workers Union (KCGW)..... 3<sup>rd</sup> Respondent  
Association of County Government Employers (ACGE)..... 4<sup>th</sup> Respondent

**4. Cause No. 2062 of 2012**

National Union of Water and Sewerage Employees..... Claimant

*Versus*

Nairobi City Water and Sewerage Company Limited..... Respondent

**5. Cause No. 755 of 2013 (the present suit)**

National Union of Water And Sewerage Employees..... Applicants

*Versus*

Nairobi City Water and

Sewerage Company Limited..... 1<sup>st</sup> Respondent

Kenya County Government Workers Union..... 2<sup>nd</sup> Respondent

The Registrar of Trade Unions..... 3<sup>rd</sup> Respondent

Elijah Otieno Awach..... 4<sup>th</sup> Respondent

The Attorney General..... 5<sup>th</sup> Respondent

**6. Cause No. 1526 of 2013**

National Union of Water and Sewerage Employees..... Claimant

*Versus*

Nairobi City Water and Sewerage Company Limited..... Respondent

**7. Cause No. 1007 of 2017 consolidated with Cause No. 977 of 2017 and Cause No. 2107 of 2016**

National Union of Water and Sewerage Employees..... Claimant

*Versus*

Registrar of Trade Unions..... 1<sup>st</sup> respondent

Labour Commissioner..... 2<sup>nd</sup> respondent

Judicial Service Commission..... 3<sup>rd</sup> respondent

Nairobi City Water and Sewerage Company Limited..... 4<sup>th</sup> Respondent

Elijah Otieno Awach..... 5<sup>th</sup> Respondent

When this fact was brought to the court's attention, I called for all the files and directed the Registrar of Trade Unions to file a comprehensive report in respect of the status of the National Union of Water and Sewerage Employees to aid the court in managing the issue of multiplicity of suits existing in this Court with respect to the Union.

**Report of the Registrar of Trade Unions**

The Registrar, Elizabeth Gicheha, filed her report by way of Affidavit, which was sworn on 18<sup>th</sup> December 2018. She averred as follows-

In 2009, there were leadership wrangles within the National Union of Water and Sewerage Employees, which culminated into a suit against the Registrar in Cause 513(N) of 2009.

The Court ordered for fresh elections for the head office. The elections were conducted on 9<sup>th</sup> April 2010 and Mary Nduge Mutuku was elected as the General Secretary. Thereafter, the results were filed in court and on 16<sup>th</sup> June 2010 the Court gave directions to the effect that

the officials elected be registered.

However, on 8<sup>th</sup> March 2012, Mr. Simon Maina Wanjiku, a former official of the union moved to court to challenge the proceedings in Cause 513 (N) of 2009 seeking to have the pleadings filed therein struck out on the ground that the Mr. Daniel Rakoro of Rakoro & Company Advocates, who filed the proceedings had not taken out a practicing certificate since 2004 hence was not authorized in law to sign any documents.

The Application was allowed, the proceedings struck out and the orders issued set aside vide the Ruling delivered on 5<sup>th</sup> July 2012. The legal implication of this was that the registration of the union officials elected pursuant to the proceedings was also nullified.

The aggrieved officials moved to Court on 16<sup>th</sup> July 2012 and applied for a review of the orders which culminated into a consent in Cause 513(N) of 2009. The effect of the consent was that Mr. Awach and his officials were brought back to office.

Parties affiliated to the deregistered officials however filed an application for review of the consent order on the grounds that they were not represented by their rightful advocate when the consent was adopted. The application was dismissed on grounds that the applicants were not parties to the suit. A similar application was filed by different parties but the same was equally dismissed. In the meantime, Civil Application Nairobi 243 of 2012 (UR 174/2012) was filed in the High Court but was later dismissed for want of prosecution.

On 25<sup>th</sup> November 2016, the Registrar of Trade Unions directed all trade unions to hold elections within their respective unions between January and August 2016. Branch elections for National Union of Water and Sewerage Employees (NUWASE) were conducted save for Nairobi branch where there was a pending matter in court.

In the elections conducted on 24<sup>th</sup> September 2016 the group led by Elijah Otieno Awach was elected and subsequently registered by the Registrar of Trade Unions.

Parties allied to Mary Ndunge Mutuku held their own independent elections on 17<sup>th</sup> September 2016 which were rejected by the Registrar for having been conducted by unauthorized persons. Consequently, Philemon Atik moved this Court in Cause 2017 of 2016 seeking to restrain the Registrar from registering the union officials elected in the branch elections.

The Claimants have filed causes subsequent to cause 513(N) of 2009 being: Cause 2133 of 2011, Cause 2020 of 2012, Cause 755 of 2013, Cause 2107 of 2016, Cause 1007 of 2017 and Cause 977 of 2017; In all these causes they present themselves as officials of NUWASE and seek similar prayers. It is the Registrar's averment that the Claimants application is baseless and a means of forum shopping on issues that have already been heard and determined in other matters hence an abuse of the Court process. As such, it should be dismissed with costs.

#### **Report of Kenya County Government Workers Union**

The Kenya County Government Workers Union responded to the report in Cause 2020 of 2012 vide the Replying Affidavit of Roba Duba sworn on 4<sup>th</sup> March 2019. The affiant avers that the Claimants in Cause 2020 of 2012 have filed a multitude of suits against the same parties as well as numerous applications which are wasting precious judicial time.

The Affiant avers that pursuant to the letter from its Advocates requesting for an extract of the registered officials of NUWASE, the Registrar issued a list of the registered officials which indicated that Elijah Otieno Awach was the national general secretary. Consequently, none of the Claimants in Cause 2020 of 2012 are officials of NUWASE. They thus lack the *locus standi* to institute suits before this Court. The Court should therefore not entertain the matters to avoid abetting the abuse of its process.

The Affiant further avers that the Claimants have filed Cause 823A of 2012 which was consolidated with Cause 2504 of 2012, Cause 399 of 2012, Cause 30 of 2011 and Cause 57 of 2011 wherein the KCGWU is a party. The Affiant avers that during his tenure as the general secretary, he never issued instructions to Thomas Maosa to act on behalf of KCGWU in Cause 57 of 2011 (Petition 11 of 2012) hence the advocate lacks the *locus standi* to file suit on their behalf.

The Affiant avers that the resources it has used to defend these suits, would have been used to further the union's objectives. As such, the suits filed by the Claimants should be dismissed with costs to KCGWU.

Similarly, KCGWU filed its submissions on 10<sup>th</sup> June 2019 wherein it submits that the numerous claims against the union have been filed by persons who are not registered as the general secretary hence have no *locus standi* to do so, as such, the suits ought to be struck out. They rely on the decision of *Narayana Reddy vs. State of Karnataka, Air (1985) KAN 99, 106* as quoted in *GV Odunga's Digest on Civil Case Law and Procedure Volume 7, 3<sup>rd</sup> Edition at page 5253, Rift Valley Railways Workers Union (K) vs. Kenya Railways Staff Retirement Benefits Scheme & Another [2017] eKLR* and *KUDHEIHA Workers vs. Bom Mbwinjeru Primary School [2018] eKLR*.

They also submit that the multiple filing of suits is tantamount to an abuse of the Court process and wastage of judicial time and resources. It is their further submissions that the Claimants should be condemned to costs for filing multiple causes under the pretense of being union officials.

#### **Response by Philemon Atik**

Mr. Philemon Atik sought to rely on the submissions of Mr. Maosa in Cause 2133 of 2011 dated 26<sup>th</sup> November 2018 and the Claimant's submissions in Cause 755 of 2013 filed on 17<sup>th</sup> December 2018.

The position in the submissions is that the Registrar issued different extracts with varying interim officials without consulting the union delegates. Cause 513(N) of 2009 was filed against the Registrar for interfering with union affairs and changing extracts from time to time. Further, that the ruling regarding consolidation in Causes 2133 of 2011, 399 of 2012, 2062 of 2012, 90 of 2012, 823 of 2012, 823A of 2012 and 2020 of 2012 were set aside by the Court of Appeal in Civil Appeal 18 of 2013.

### **Submissions by Maosa and Company Advocates**

In the submissions dated 26<sup>th</sup> November 2018, filed by the firm of Maosa and Company Advocates and relied upon by Rufus Osotsi and Philemon Atik; it was submitted that the Registrar kept changing extracts from Shakambo, Ngasha and Mary Ndunge Mutuku without approval from NUWASE.

As a result of the issuance of another extract on 16<sup>th</sup> June 2016, causes 2017 of 2016, 977 of 2017 and 1007 of 2017 were filed to challenge the extract. Further, Elijah Awach has no court order or elections to support his ascendancy to the position of Secretary General of NUWASE.

### **Submissions by Attorney General**

Ms. Shitubi informed the court that she would be relying on the submissions filed in 1007 of 2017 as consolidated with 977 of 2017. However, she did not indicate which particular submissions she was relying upon. Further, there is no record of submissions filed on behalf of the Registrar in the matter.

### **Submissions by Mr. Osotsi**

Mr. Osotsi informed the court that he would be relying on the Affidavit filed in 977 of 2017. He did not indicate the date the said Affidavit was filed or when it was sworn. As such, it was difficult for this Court to determine which Affidavit he wished to rely on.

### **Analysis and Determination**

After considering the report by the Registrar of Trade Unions, parties' submissions and their affidavits, the issues before this Court for determination are-

- a. Who are the legitimate officials of the National Union of Water and Sewerage Employees.
- b. Whether the suits filed by the former officials of the National Union of Water and Sewerage Employees should be struck out for being vexatious and an abuse of the Court process.

From the history of NUWASE as set out in the submissions of the parties, it is clear that from the time of registration of the interim officials of the union, there have been leadership wrangles that have resulted in many disputes being filed, among them those cited herein. The union has also had demarcation disputes with the Kenya Local Government Workers Union (Now Kenya County Government Workers Union KLGWU).

The leadership wrangles that are still subsisting have pitted two teams, one led by Mary Ndunge Mutuku and the other by Elijah Otieno Awach.

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.

On the issue of leadership wrangles between the MARY NDUNGE MUTUKU TEAM (NDUNGE TEAM) and ELIJAH OTIENO AWACH TEAM (AWACH TEAM) the position of this court is that all cases filed before the union elections of 2016 are redundant. The being that under the powers conferred by Section 34 of the Labour Relations Act, the Registrar of Trade Unions calls for elections every five years. The last such elections were held in 2016. Any officer who held any elective position in the union prior to 2016 elections had their position

declared vacant by the calling of national elections for all unions in 2016. The only valid disputes are therefore those challenging the elections of 2016.

Accordingly, the only suits that should proceed are

1. Cause No. 2107 of 2016 – Philemon Atik –V- Registrar of Trade Unions and 4 Others.
2. Cause No. 1007 of 2017 – Mary Ndunge Mutuku –V- Registrar of Trade Unions and 4 Others
3. Cause No. 977 of 2017 – Rufus Olela Osotsi –V- Registrar of Trade Unions and 4 Others.

The three suits have already been consolidated and will be heard under file **No. 1007 of 2017 – Mary Ndunge Mutuku –V- Registrar of Trade Unions and 4 Others.**

In view of the fact that the term of office of the officers presently in office is coming to an end in 2021 when the next national elections are due, the court directs that Cause No. 1007 of 2017 as consolidated be set down for hearing on priority basis.

### **Conclusion**

In conclusion, the court orders as follows –

1. All files relating to demarcation between NUWASE and KCGWU are hereby closed. These include –
  - (i) Cause 2133 of 2011,
  - (ii) Cause 823A of 2012 and 823 of 2012
  - (iii) Cause 2020 of 2012
  - (iv) Cause No. 2062 of 2012
  - (v) Cause No. 1526 of 2013
2. Cause No. 1007 of 2017 as consolidated with Cause No. 2107 of 2016 and 977 of 2017 to proceed to hearing and final determination.
3. The Deputy Registrar is directed to physically remove the files that have been declared closed from the registry to the archives to avoid any further multiplicity of suits between the parties in these suits.
4. Each party shall bear their costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22<sup>ND</sup> DAY OF NOVEMBER 2019.**

**MAUREEN ONYANGO**

**JUDGE**