



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 398 OF 2015

(Originally Nairobi Cause No. 2253 of 2015)

GEOFFREY ASANYO

CLAIMANT

v

COUNTY GOVERNMENT OF NAKURU

1ST RESPONDENT

NAKURU WATER & SANITATION CO. LTD

2ND RESPONDENT

RIFT VALLEY WATER SERVICES BOARD

3RD RESPONDENT

RULING

1. Geoffrey Asanyo (applicant) commenced legal proceedings against the Respondents in Nairobi on 16 December 2015 and the issue in dispute was stated as *the renewal of the term of the directors of the Nakuru Water Services and Sanitation Company lapsing on 17.12.2015.*
2. At the same time the applicant lodged a motion under certificate of urgency seeking
 1.spent.
 2. THAT pending the hearing and determination of this application the Respondents their agents, assignees be restrained from advertising and replacing the position of the director representing the business community.
 3. THAT pending the hearing and determination of the claim herein the Respondents, their agents, assignees be restrained from relinquishing the position of the applicant as a director to the company after the lapse of 3 years term.
 4. Cost of this application be provided for.
3. Wasilwa J before whom the motion was placed at the *ex parte* stage granted orders 1 and 2 as sought and directed that the Cause be transferred to Nakuru for hearing and determination.
4. The Cause was duly placed before me on 18 December 2015, and I directed that the motion be heard on 25 January 2016. The Respondents were directed to file their responses to the motion before the *inter partes* hearing.
5. Come 25 January 2016, the 1st Respondent had not filed any responses and it sought leave to file its papers. At the same time, it contended that the orders sought had been overtaken by events.
6. Mr. Ogola who appeared for the 2nd Respondent indicated that he was in the process of filing his papers, but at the same time hinted that his firm had acted for the applicant and there was a

- likelihood of conflict of interest being raised.
7. The 3rd Respondent was not in attendance.
 8. The parties appeared not intent to proceed with the motion but the Court directed that the motion proceed to hearing.
 9. When the Cause was called out later, Mr. Ogola informed the Court that though he had filed a replying affidavit to the motion, he had also filed an application to strike out the Cause.
 10. The Court directed the parties to file responses to the striking out application within 7 days and that the applicant's motion proceed to arguments.
 11. Before delving into the merits of the applicant's motion, the Court wishes to address the concerns about the conflict of interest on the part of the firm of Gordon Ogola, Kipkoech & Co. Advocates which were raised from the bar.

Conflict of interest

12. The Respondents were served with the motion and initial orders on 16 December 2015 as directed by the Court.
13. The 2nd Respondent opted to instruct the firm of Gordon Ogola, Kipkoech & Co. Advocates. The said firm filed a Notice of Appointment of Advocates on 25 January 2016.
14. Principally, the reasons for directing that the motion proceed were that the motion had been filed under certificate of urgency and the applicant had been granted *ex parte* orders. The effect of the *ex parte* orders were that the Respondents were stopped from recruiting new directors for the 2nd Respondent, while the gravamen of the applicant's case was that the Respondents had not initiated a process to renew the terms of directors which had expired (about to expire).
15. Further, the law on conflict of interest on the part of an advocate is now clear.
16. For conflict of interest to be presumed there must be clear demonstration of the nature of interest. Mere speculation would not do.
17. The parties did not disclose the particular Advocate in the firm of Gordon Ogola & Kipkoech & Co. Advocates who had acted for the applicant previously.
18. It is not disputed that the said firm has more than one advocate and as was observed in *National Bank of Kenya Ltd v Peter Kipkoech Korat* (2005) eKLR, just because one advocate in a firm handled a litigant's brief would not require the disqualification of the whole firm of advocates.
19. The above observation was in tandem with the legal principle(s) expressed in *Rakusen v Ellis Munday & Clarke* (1912) 1 Ch. 831 that there is no absolute bar on a solicitor in a case where one partner in a firm of solicitors has acted for one side and another partner in that firm wishes to act for the other side in litigation unless the Court is satisfied that real mischief and prejudice would be suffered.
20. No sufficient evidence was provided in the present case either by Mr. Ogola or the counsel for the applicant of any apprehended mischief or prejudice.
21. Back to the present motion.
22. Order 2 as sought and granted by Wasilwa J became spent immediately the motion was heard *inter partes* on 25 January 2016 and it would serve no useful purpose for the Court to address its mind to it. The only substantive order for examination is order 3.
23. The principles for grant of injunctions at this stage are trite and the wheel cannot be turned in this case.

Prima facie case

24. The applicant exhibited a letter dated 18 December 2012 and an extract therefrom states

We refer to Company's Extra-Ordinary General Meeting held on 17th December 2012 in which your term was extended as the representative of the Business Community in the Company's Board of Directors.

25. It is clear from the above excerpt that the applicant had served a previous term as director of the 2nd Respondent. He did not disclose when that term commenced or ended. But, that was

- information within his knowledge.
26. The applicant also exhibited a copy of the Amended Memorandum and Amended Articles of Association of Nakuru Water & Sanitation Services Company Ltd.
27. Article 87(a) of the Amended Articles of Association is to the effect

The term of directorship shall be three (3) years.

28. Article 87(c) on the other hand provide for the tenure of a director in the following term

A retiring Director shall be eligible for re-election for one other term and shall serve for a maximum of 6 years (two terms).

29. From the documents relied on by the applicant, it is doubtful whether he is eligible for the renewal of his term.
30. Therefore, it is not clear what legal injury or actionable wrong the applicant or the business community he was representing have suffered or risks suffering, were the orders he is seeking be declined on the papers, at this stage.
31. In other words, the applicant has not demonstrated a *prima facie* case.

Balance of convenience/irreparable harm

32. The applicant had contended that the failure to renew the term of the directors would leave the 2nd Respondent exposed but at the same time wanted the process stopped.
33. In the view of the Court, the interests of the public in not leaving the 2nd Respondent exposed by a vacuum in directorship overshadow(ed) the applicant's interests to stop the process. The public interest was paramount compared to any concerns on conflict of interest.
34. The Court in effect dismisses the motion with costs to the 1st and 2nd Respondents.
35. Parties to take directions as to the next course of action in regard to the pending motion and the Cause.

Delivered, dated and signed in Nakuru on this 11th day of March 2016.

Radido Stephen

Judge

Appearances

For applicant Mr. Mbuvi instructed by Katunga Mbuvi & Co. Advocates

For 1st Respondent Mr. Katithi instructed by Hari Gakinya & Co. Advocates

For 2nd Respondent Mr. Ogola instructed by Gordon Ogola, Kipkoech & Co. Advocates

For 3rd Respondent did not file any papers

Court Assistant Nixon