



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NYERI

CAUSE NO.48 OF 2014

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

-VERSUS-

**NYERI WATER AND SANITATION COMPANY
LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 31st October, 2014)

RULING

The claimant filed a notice of motion on 25.08.2014 brought under Order 40 Rule 3(1) of the Civil Procedure Rules 2010, Sections 11 and 12 of the Industrial Court Act, Rules 16, 19, 20, 27 and 28 of the Industrial Court Rules, Section 5 of the Judicature Act, and all the enabling provisions of law. The claimant prayed for orders:

1. That the honourable court be pleased to cite Joseph N. Guandaru, Duncan Maina Mathenge, Elizabeth M. Wanjau, Grace Mukuha, Eng. Michael M. Thuita, Mr. Patrick I. Mugwara, Mr. Patrick Kamaru, Mr. s.w.n. Githitu, Mr. Walter O. Ogwindo and Richard K. Gikuhi, the Chairman, members of the board of directors and the company secretary of the respondent for contempt of court orders given on 7th May 2014 and extended on 26th May 2014, 26th June 2014 and 27th July 2014, by ordering for attachment and sale of the contemnors' property and apply the same as compensation to the claimant AND IN ALTERNATIVE the court do commit the contemnors to jail for a period of 6 months or any other period that the honourable court deems fit and or until they purge the contempt and or such further orders be made as may be just.
2. That the contemnors do purge the contempt by cancelling all discussions, deliberations and resolutions made and arrived at in the board meeting held on 31st July 2014 in respect to appointment of the respondent's managing director which is subject matter of this cause.
3. That cost of the application be borne by the respondent.

In view of the application, the court gave interim orders on 7.05.2014 thus, **“THAT meanwhile the status quo as is today 7th May 2014 be maintained pending further directions of the court”**.

The respondent filed the preliminary objection on 27.05.2014 on the grounds that the claimant lacks *locus standi* to move the court for the orders sought in the suit; and that the court lacks jurisdiction to grant the orders sought in the suit.

The court directed that the notice of motion and the preliminary objection be heard concurrently on 21.10.2014.

The claimant's submission is that while the interim orders were subsisting, the respondent through the persons named in the order as stated in the notice of motion convened a meeting on 31.07.2014 whose main agenda was the appointment of the respondent's managing director. It was submitted for the claimant that the meeting as convened contravened the interim order on status quo.

On the preliminary objection, the claimant submitted that the respondent had not filed a defence and the objection was irregular in the circumstances. Further the suit was about employment of the respondent's managing director and brought by the sector trade union so that it was a proper suit within the jurisdiction of the court. Further the preliminary objection was premised upon disputable facts and therefore did not pass the well established principle that a preliminary objection only lies where the facts are settled and not in dispute as between the parties to the suit. Further, it was submitted for the claimant that the court had jurisdiction to hear and determine the suit because the subject matter was about employment and the parties are a union and an employer.

The respondent opposed the notice of motion upon the grounds of opposition filed on 09.09.2014. The respondent urged that the court lacked jurisdiction to hear and determine the application, the claimant had failed to comply with the relevant rules for successful contempt application, the court had not been properly moved, and the application was frivolous, vexatious and an abuse of court process. It was submitted for the respondent that under Order 52 Rule 2(1) of the Rules of the Supreme Court of England which apply to the contempt applications, leave was necessary but was not sought or obtained by the claimant before filing the application for contempt. The respondent relied on the ruling in **John Mugo Gachuki –Versus- New Nyamakima Company Limited (2012)eKLR** where Odunga J. upheld the principle that leave is necessary in bringing contempt application. It was further submitted that there was no evidence of service of the order upon the proposed contemnors. It was further submitted that the order in issue was fluid as the status quo as ordered was not clear and in any event the respondent had taken the position not to vest the appointment of the respondent's director in the Governor for Nyeri County pending the hearing and determination of the suit and in compliance with that understanding of the effect of the interim orders.

The court has considered the parties' respective submissions. The court makes findings as follows:

1. There is no evidence on record that the claimant applied for and obtained leave to file the contempt proceedings and the court finds that the notice of motion is incurably ill-fated for want of due leave by the court.
2. There was no evidence that the order of status quo was served upon the proposed contemnors and the disobedience as alleged by the claimant has not been established.
3. The suit is between the claimant trade union and the respondent as an employer in exercise of the respondent's power to appoint its managing director. The court finds that the dispute is between a trade union and an employer and the subject matter is appointment of a managing director which is obviously a human resource function. Thus, the court finds that it has the jurisdiction and the claimant has the necessary standing or issue of standing can only be properly canvassed after close of pleadings and full hearing before appropriate determination is made by the court.

In conclusion, both the notice of motion dated 25.08.2014 and the preliminary objection dated 26.05.2014 are dismissed with orders:

- a. Each party to bear own costs of the application and the preliminary objection.
- b. The respondent by itself, its board, its board members, agents or employees shall not take steps to vest the power to appoint the respondent's director in the Governor for Nyeri County until further orders by the court or pending the hearing of the suit or the hearing of the notice of motion filed on 17.04.2014.
- c. Parties to take directions on further steps in the suit.

Signed, dated and delivered in court at Nyeri this Friday, 31st October, 2014.

BYRAM ONGAYA

JUDGE