



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 441 of 2010

KENYA LOCAL GOVERNMENT WORKERS UNION..... CLAIMANT

VERSUS

NYAHURURU WATER & SANITATION COMPANY LTD.....RESPONDENT

RULING

The application before court is the one dated 20th April 2010. The application is filed by the D.K. Kaburu and Company Advocates. The application was filed under certificate of urgency and the urgency was prompted by the facts that:

1. The Respondents were in the process of altering/amending the terms and conditions of service and/or of employment between it and its employees and forcing members of the claimant union to sign the same against their will.
2. The Respondent had threatened that any employee who will not sign the new terms and condition of employment shall be sacked summarily.

The applicants sought order that

1. THAT, the application be certified as urgent and be heard *ex parte* in the first instance.
2. THAT a temporary injunction be issued against the Defendant, its servants, agents or employees restraining it from altering/amending the terms and conditions of service relating to all the 78 employees of the Respondent (who are also members of the Claimant Union, or imposing and or implementing any other terms and conditions of employment until this case is heard and determined.
3. THAT pending the hearing and disposal of this application, an *ex parte* order (in terms of prayer 2 above) do issue in the first instance.
4. THAT, this Honourable court be pleased to make such further orders as this honourable court may deem appropriate.
5. THAT the costs of this Application be in the cause.

The application is supported by an annexed affidavit of Bonface M. Munyao and the grounds that:

- (a) THAT the contract of employment between the Respondent and its employees is governed by a

Collective Agreement between the parties registered with this Honourable Court.

- (b) THAT the contracts clearly stipulates that they cannot be altered, Amended or changes without an agreement in writing.
- (c) THAT the Respondent has unilaterally issued other different terms and conditions of service and review of salary and grades which the Plaintiff or its employees have not agreed upon.
- (d) THAT the Respondent is keen to impose those unilateral terms and conditions and has threatened the Claimant employees with a sack if they do not sign them.
- (e) THAT the Respondent's action is in breach of the contract, Collective Bargaining Agreement and the law as they are unilateral and unacceptable to the Claimant.
- (f) THAT the Respondent should be enjoined from breaching both the law and the contracts of employment.
- (g) THAT unless an order of injunction is issued, the Respondent will continue to disregard the terms and conditions already in existence in complete disregard of the law.
- (h) THAT the claimant and the aforesaid employees are likely to suffer irreparable loss and damages unless an injunction is issued.
- (i) THAT the claimant is apprehensive the the respondent will sack the foresaid employees from employment unless an order of injunction is issued.

In the interim when the application was heard *ex parte*, the court gave orders that:

“The respondents, its servants agents or employees be restrained from altering/amending the terms and conditions of service relating to all the 78 employees of the respondent who are the claimant's members ending the hearing and determination of the application.”

The respondent was directed to file their defence and replying affidavit within a week and the application was set to be heard on 20th May, 2010. On 20th May, 2010, when the matter came up for the hearing of the application *inter partes* the respondent had filed their replying affidavit and the respondents sought leave to file a supplementary affidavit for which leave was granted. The parties finally consented to have the application proceed by way of written submissions and they relied on their affidavits.

The Respondent filed their replying affidavit and defence in this matter on 1st May, 2010 through the firm of Njeri Wamithi & Company Advocates. The affidavit was sworn by one Joseph Maina Theuri the Managing Director and Principal officer of the Respondent herein.

According to claimant the Respondent company was incorporated in 2002 and it thereafter took over all the 78 employees (unionisable) formally from Municipal Council of Nyahururu. The said employees were duly issued with employment letters by the Respondent on 3rd September 2004. It was apparently understood that the terms of service of each and every unionisable employee was to be improved beyond the current terms and condition of service applicable to all unionisable employees of the Local Authorities. The claimant avers that in year 2005, the Union negotiated on behalf of the said employees with the respondent and a Collective Bargaining Agreement on behalf of the Respondent and the Unionisable employees was signed on 24th November, 2005. The contract of employment and the Collective Bargaining Agreement foresaid contained the description of the job, grade and quantum of salary of the Respondent's employees amongst other terms. It is the claimant's contention that any dispute or adjustments of the rights and liabilities between the Respondent and its employees must be resolved in accordance with the contract of employment and the Collective Bargaining Agreement.

That the said contract also provided how to amend or alter the terms and conditions and conclusion of the agreement. The claimant contend that on or about 4th March, 2010, in breach of the contract of employment between the claimant and Respondent in violation of Collective Bargaining Agreement, gave direction to all unionisable employees aforesaid to sign fresh terms and conditions of employment described by Respondent as **“Review of Grade and Salary Exercise”**

The claimant further contend that any attempt to introduce any new terms and conditions or review of Grade and Salary by the Respondents is illegal and in breach of the contract of employment and Collective Bargaining Agreement as claimants have not been consulted. Further the claimant and entire unionisable membership have not agreed with Respondents preposition as per the contract of employment and Collective Bargaining Agreement governing them. The said employees refused to sign the new terms and conditions of service and the Respondents have now resorted to intimidation and arm-twisting and the Respondent have declared that any employee who fails to sign the said terms will be dismissed from employment summarily.

The claimant contend that if any employees are forced to enter into new terms and conditions, they will lose their jobs gratuity, salary arrears accrued from negotiated Collective Bargaining Agreements of 2002 and 2005 and even job grades.

In their supplementary affidavit, the claimants further aver that they have a Collective Bargaining Agreement applicable to Respondent and that it covers all officers of Local Authorities and Councils, Water Companies who are appointed to pensionable posts within the permanent establishment.

The Respondents on the other hand contend that when the officers who were working for the Municipal Council of Nyahururu entered fresh contracts of employment, with Respondent, they ceased to be members of claimant union as the Respondent is a company and the claimant union is for local Government employees. The Respondents aver that they are neither a Local Authority nor a agent of a Local Authority and cannot therefore be bound by an agreement entered into between the Ministry for Local Authorities.

By reason of the fact that the Respondent is not a Local government authority this court would have allowed the contention of the Respondent to rest. However, it is also apparent that when the Respondents took over the claimants who previously worked for the Local authority, it was part of the agreement that at clause 9 stated that:-

“in the financial and personnel restructuring programme, the company shall absorb all staff detailed on asset Register dated October, 2002, make arrangement to settle any outstanding remittances of the statutory deductions as a matter of priority subject to the provisions of this agreement arrangement for remunerative incentive package for the absorbed staff and give this said staff liberty to join a workers union of their own choice”.

The issue of the workers benefits such as gratuity with the former employer if any also need to be resolved before the Respondents can categorically say they are not bound with agreements entered in before.

I believe the claimant have established that they have a *prima facie* case and I therefore allow the claimant’s application and order that an injunction to issue against the responds, the servants, agents or employees from altering/amending the terms and conditions of service relating to all the 78 employees of the Respondent (who are also members of the claimant’s union) or implementing any other terms and conditions of employment until this case is heard and determined.

Costs will be in the cause.

Signed, dated and delivered in court at Nairobi this 6th day of December, 2012.

HELLEN WASILWA

JUDGE

No appearances:

Mr. D.K. Kaburu

for Claimant

Mr. Okeyo

for Respondent

Ms Rachel Gichuki

Court Clerk