



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
MISC APPLI 1270 OF 2007

THE KENYA HOTEL KEEPERS & CATERING ASSOCIATION...APPLICANT

Versus

THE INDUSTRIAL COURT OF KENYA & 2 OTHERS.....RESPONDENT

JUDGMENT

The Petitioner herein is the Kenya Hotel Keepers and Caterers Association, who filed the petition dated 6th December 2007, alleging contravention of its rights under Section 77(9) of the Constitution, by the Industrial Court of Kenya (the Respondent). The Kenya Hotels and Allied Workers Union and Serena Beach Hotel (Mombasa) were named as the Interested Parties. The Petitioner sought the following orders:-

- (a) A declaration that Section 17(1) and (2) of the Trade Disputes Act Cap 234, is inconsistent with the provisions of Section 65 (2) and 77 (9) of the Constitution and is to that extent of the inconsistency null and void pursuant to Section 3 of the Constitution;
- (b) A declaration that the Award rendered by the Respondent in Industrial Cause No 31 of 2007 violates the Petitioner's Constitutional rights and provisions of Section 77 (9) of the Constitution and is null and void;
- (c) Such other orders as this Honourable court shall deem fit to grant;
- (d) Costs of this petition.

The petition was filed by Guserwa Advocate on behalf of the Petitioners. Despite the fact that the petition was served on the Respondent Mr. Omondi appeared but never filed any reply nor did he appear at the hearing of the petition. Mr Enonda purported to be instructed by the 1st Interested Party but never filed a notice of appointment nor did he file any papers. The petition was undefended

The petitioner is challenging the award in I.C. 31/07. In that award the Respondent ordered the recognition of Kenya Hotels & Allied Workers Union by the Hotel (Serena Beach Hotel) and that we parties had to sign a recognition agreement within 3 months of the date of the Award. According to the Applicant, their rights were infringed because Serena Beach Hotel had been sued without the Applicant being enjoined to the proceedings to represent the Hotel which was their member and despite the

Petitioner instructing her counsel, Mr Guserwa Advocate to address the to letters dated 11th May 2007 and 18th May 2007 to the Respondent seeking to be enjoined to the proceedings the letters went unanswered. The letters were exhibited as MM1 and 2. MM1 bears the stamp of the Industrial Court of 14th May 2009. MM2 however does not bear the court stamp. It is the Applicant's contention that the matter proceeded to hearing without the Petitioner being informed of the hearing date and an award made on 11th September 2009 which was prejudicial to the members because they were ordered to recognize a Union which they had no dealing with.

The Respondent did not file any response either at the Chamber Summons stage or at this stage. The facts as presented by the Applicant are not controverted. The court will therefore find that despite the Applicants request to be enjoined to the proceedings in I.C 31/07 they were not given a chance even to demonstrate that they had an interest. Yet at page 3 of the award, the court clearly stated that, **“On the other hand the Hotel which is commonly known as Mombasa Serena Beach Hotel is an integral part or unit of Serena Hotels and Lodges and a member of the Kenya Association of Hotel Keepers and Caterers.”** The Industrial Court did recognise the Applicant's interest yet did not give them a chance to come into the matter and articulate its case. The rules of natural justice demand that a party who may be adversely affected by a decision be given a hearing. The tenet is integrated in Section 77(9) of the Constitution, that a party before an adjudicating body be given a fair hearing within a reasonable time. In this case, the Applicants were not even allowed to come on record though their interest in the matter was recognized by the Industrial Court. They were denied their right to be heard and their members were therefore condemned without getting full representation from its union and that would call for intervention by this court, to declare the award subsequent to those proceedings a nullity.

This court is aware that the Trade Disputes Act under which the Industrial Court proceeded was repealed. We have in place the Labour Institutions Act and Labour Relations Act. The law now is that an appeal from Industrial Court lie to the Court of Appeal under S.27 of the Labour Institutions Act. However, I note that the challenge therein relates to alleged violation of constitutional rights to which only the High Court has jurisdiction and this matter is properly before this court. This is because the challenge does not touch on the merits of the cause but the conduct of the court in the hearing and determination of the matter.

Having observed the above, I find that the Applicant's right to a fair hearing under Section 77 (9) was violated when it was shut out of the seat of justice and a declaration will issue declaring the award in Industrial Court 31/07 to be null and void. I grant prayer (b) of the petitioner. Prayer as was overtaken by events upon the repeal of the Trade Dispute Act.

Costs to the Petitioner.

Dated and delivered at Nairobi this 10th day of July 2009.

R. V. P WENDOH

JUDGE

Present

Ms. Guserwa for the Petitioner

Mr. Wando for the Respondent