IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 90 OF 2017

BETWEEN

SUCHAM INVESTMENTS LIMITED T/A

AMANI TIWI BEACH RESORT.....APPELLANT

AND

KENYA HOTEL AND ALLIED

WORKERS UNION (KHAWU).....1ST RESPONDENT

KENYA UNION OF DOMESTIC, HOTELS,

EDUCATIONAL INSTITUTIONS AND HOSPITAL

WORKERS (KUDHEIHA).....2ND RESPONDENTS

(*Being an appeal against the Judgment of the Employment & Labour*

Relations Court at Mombasa (Rika J.) dated 30th June, 2017

in

E&L.R.C.C.No. 163 of 2014)

****

JUDGEMENT OF THE COURT

[1] The origin of this appeal was a claim filed in the Employment and Labour Relations Court, by the Kenya Hotels and Allied Workers Union (1st respondent). They were principally seeking among other orders, that the appellant be compelled to negotiate a fresh Collective Bargaining Agreement (CBA) with the Union. The 1st respondent's case was that it had a valid recognition agreement with the appellant that was signed on 17th October, 2006 against which a CBA in relation to the Tiwi Beach Resort (hotel) a bargaining unit then ran by the appellant was to be negotiated. Nonetheless for the period between February, 2007 and January, 2009 the hotel burnt down and closed for business. According to the 1st respondent, this forced the parties to terminate all the existing employment contracts of the workers but the 2007 - 2009 CBA was to remain in force until such a time that the hotel was to reopen for business. The hotel business reopened in October, 2012. The Union purported to recruit newly employed staff members afresh from the reconstituted bargaining unit and submitted the check-offs lists requiring the appellant to remit to it union dues in respect of the recruited employees. The 1st respondent also sought to negotiate a fresh CBA with the appellant which requests the appellant declined thereby giving rise to the aforesaid claim.

[2] On the other hand the appellant contended that the Recognition Agreement referred to by the 1st respondent was with Sucham Investments Ltd trading as Tiwi Beach Resort and not Sucham Investment trading as Amani Tiwi Beach Resort which started operations in October, 2012. Moreover when Amani Tiwi Resort commenced operations, it signed a memorandum of agreement with the umbrella union of Kenya Hotels Keepers and Caterers Association which was a rival union with the 1st respondent. The 2nd respondent was joined in the suit as an interested party and duly filed their reply. In the said reply, the 2nd respondent emphasized that the Recognition Agreement signed on

17th October, 2006 came to an end when Tiwi Beach Resort burnt down and all the employees were declared redundant and were duly paid their dues thereby ceasing to be employees of Sucham Investment. The new employer being Amani Tiwi Beach Resort re-opened the premises and recruited new employees out of which the 2nd respondent recruited 51% by May, 2013 way before the 1st respondent. Thus their dues were being collected and remitted to the 2nd respondent.

[3] Upon analysing and considering the evidence, the learned Judge **Rika J.** rendered an award dated 30th June, 2017 in which he found the recognition agreement between the 1st respondent and the appellant was not/has never been formally terminated. Therefore without formally terminating the recognition agreement the subsequent recognition agreement with other entities was of no effect; these were the final orders in the Judge's own words:-

> ***"***
>
> ***1. The respondent (now appellant) shall not victimize any of the claimant's members working for the respondent, on account of their association with the claimant union***
>
> ***2. The respondent shall deduct trade union dues from the claimant's membership as per the check off lists submitted to the respondent by the claimant union***
>
> ***3. The respondent shall negotiate a fresh CBA with the claimant union, to be concluded and registered with the Employment and Labour Relations Court within 90 days of this Judgment***
>
> ***4. The respondent shall grant the claimant Union limited access to its members within the workplace***
>
> ***5. No order as to costs."***

[4] The appellant was aggrieved by the said orders hence the instant appeal that is predicated on some 7 grounds of appeal which are long winding and repetitive contrary to the provisions of **Rule 86(1)** of the **Court of Appeal Rules**. The Rule stipulates in mandatory terms thus:

> ***"A Memorandum of Appeal shall set forth concisely and under distinct heads, without argument or narrative the grounds of objection to the decision appealed against, specifically the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the Court to make."***

[Emphasis added].

Thus we can summarize all those grounds into one that is whether the learned Judge was right by ordering the appellant to negotiate, conclude and register a fresh CBA with the 1st respondent within 90 days from the date of the judgment. The other peripheral issue is the effect of the judgment in Industrial Court Cause No. 39 of 2007 at Nairobi between **Kenya Hotels and Allied Workers Union vs. Grand Regency Hotel & Kenya Union of Domestic Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA)** in which the then Court Tribunal found that KUDHEIHA was no longer an appropriate representative of the Hotel industry. That there should be no new Collective Bargaining Agreements (CBAs) entered into with KUDHIHA in the hotel industry. This has to be considered alongside the decision by a three judge bench in Petition No. 5 of 2013 **Kenya Hotels and Allied Workers Union vs. Attorney General** in which the Judge held that KUDHEIHA cannot be kicked out of the industry without affecting its members and the existing CBO's.

[5] During the plenary hearing of this appeal, **Mr. Mugambi** learned counsel for the appellant relied on his written submissions and made some oral highlights. **Mr John Simiyu** and **Hezron Ohwongá** from the Unions represented the 1st and 2nd respondents respectively. They too relied on their written submissions and made some oral highlights.

[6] According to Mr. Mugambi, Tiwi Beach Resort and Amani Tiwi Beach Resort are two different entities; the former ceased operations when the business premises burnt down, all its employees were declared redundant and their dues paid. Therefore the recognition agreement was before the appellant was incorporated; it was signed by an entity that ceased to operate and the Judge was therefore wrong to hold that the recognition agreement was not formally terminated. Commenting on the later business entity counsel submitted that this commenced business under a different business name and commenced business in October, 2012; it signed a recognition agreement with the Kenya Hotel Keepers and Caterers Association. The appellant was unfairly dragged into union wars between the rival unions. Counsel cited several decisions where courts have held that an employer has a right to choose the union within which to enter a recognition agreement with just as the employee. This is on condition that the union will have recruited 51% employees as the two rights must be construed in harmony. Counsel made reference also to the provisions of **Article 36** of the **Constitution** which establishes freedom of association including that of the appellant being the employer to choose the union. Consequently to order the appellant to leave an association of trade union of their choice and negotiate with the 1st respondent would go contrary to their basic freedoms.

[7] The appeal was supported by the 2nd respondent's union that was represented by a Mr. Onwang'a. The submissions by the 2nd respondent largely echoed what was stated by the appellant while defending the recognition agreement that was signed between them and the appellant after the re- opening of the hotel business under the name of Amani Tiwi Beach Resort.

[8] Rising on his feet to oppose the appeal, Mr John Simiyu a Union representative for the 1st respondent supported the award by the trial Judge while insisting that the appellant and the 1st respondent have a valid recognition agreement which came into force in October, 2006 which was entered into by Sucham Investments limited a legal entity. The introduction of the later business name was meant to rebrand the business that closed down and was a mere change of agency who lacked capacity to enter into a recognition agreement with the 2nd

respondent. In his view the 2nd respondent is a limited company whose objectives have nothing to do with trade union activities. Also a point to take note of, is the fact that the appellant has partially complied with the said court order being appealed against by engaging the 1st respondent in negotiating a CBA where substantial progress has been made.

[9] The Union representative termed the instant appeal an academic exercise. On whether the purported recognition agreement between the appellant and the 2nd respondent was valid after Judge Koskei sitting in the former Industrial court the predecessor of the Employment and Labour Relations Court had declared the 2nd respondent unsuitable as a Union representative in the hotel industry, Mr Simiyu held the view that the said decision was not set aside by the subsequent three Judges' decision as there was no appeal. Therefore there was no valid agreement with the 2nd respondent. He went on to submit that the decision by the 3 Judges of ELRC in Petition No. 5 of 2013 which gave a lifeline to the 2nd respondent was pending appeal in the Court of Appeal and so were all the other cases that were cited by counsel for the appellant. We were urged to dismiss the appeal.

[10] We have carefully considered the record, the judgment, the grounds of appeal, submissions by learned counsel for the appellant, the union representatives, the authorities cited and the law. The issue for determination in our view is whether the recognition agreement signed between TIWI BEACH RESORT SUCHAM INVESTMENTS LTD on one hand and KENYA HOTELS AND ALLIED WORKERS UNION on 17th October, 2016 survived the burning down of the business premises, the declaration of redundancy of all the employees who were the beneficiaries thereto and whether it was still binding and enforceable as against the appellant.

[11] It is palpable from the records that the 1st and 2nd respondents are rival trade unions all competing for employees to represent hence the scramble to enter into a recognition agreement and subsequently a CBA on behalf of the employees. Besides representing the employees obviously in return the union dues are to be paid effortlessly by way of a cheque off system to be deducted from the employees by the employer. Be that as it may, we find the learned Judge quite aptly appreciated this rivalry between trade unions that escalated and was subject of determination by court. There are two schools of thought as argued by counsel for the appellant arising out of two divergent court opinions; one was rendered by the former Industrial Court the predecessor of the Employment and Labour Relations Court being the decision of **Koskei J.** in Nairobi Cause No. 39 of 2007, **Kenya Hotels and Allied Workers Union vs. Grand Regency Hotel** held that the 2nd respondent was no longer the appropriate, relevant and representative union within the hotel industry and ordered it to completely vacate the hotel industry upon expiry of then existing collective bargaining agreements. Almost 8 years later, on 6th November, 2015 a bench of three judges of the Employment and Labour Relations Court, a court with equal status as the High Court while determining a similar issue over recognition agreements in the case of **Kenya Hotels and Allied Workers Union vs. Attorney General & 6 others** [2015[eKLR had this to say;

> ***"The prayer to order the Registrar of Trade Unions to strike out the words "hotels, restaurants, casinos, campsites, catering and similar establishments providing lodging, food, beverages or both and further categories of related establishments providing tourism services" from the Constitution of the 3rd respondent would in our view infringe on the freedom of association of the 2nd respondent and the employers who are its members as well as the freedom of association of all the employees who are the 3rd respondent's members within the sector who are not the claimant's members. Having joined a crowded field by seeking registration in an arena where there was already another player, the claimant must be prepared for the competition and to fight for its share of members. It cannot use an order of his court to get members where it has been unable to recruit over the years. Should it achieve a simple majority among either all the employees in the sector or within any specific hotel it may seek recognition in accordance with the law"***

[12] Rika J., did not wish to be drawn to the above controversy but he alluded to it in his judgment when he posited as follows;-

> ***"The Hoteliers' Association, of which the respondent is a member and the interested party, were parties in the demarcation dispute at the court in Nairobi. They drew the respondent into fresh obligations, fully aware of the decision of the court on the recognition agreement between them. Parties should not burden the judiciary with new forms of disputes, in which the underlying issues have essentially been settled in past litigation…the two unions seem to have an uneasy truce and co-existence. They have not implemented the decision of the court on demarcation. It is felt this decision of the court cannot be implemented, because for instance, of KUDHEIHA's longstanding role in the hotel industry, it is for the trade unions and the Hoteliers' Association, with the aid of the Trade Union Centre and the Federation of Kenya Employers, to midwife a long term solution to the recurrent demarcation claims…"***

We too do not wish to be drawn in the same controversy as our role is determine whether the Judge erred in ordering the appellant to enter into a recognition agreement with the 1st respondent while the appellant contended that it was a different entity and upon re-opening its business, it entered into negotiations with the 2nd respondent.

[13] It was common ground that a recognition agreement was signed on 17th October, 2006 between Tiwi Beach Resort (Sucham Investments Ltd) and Kenya Hotels and Allied Workers' Union. It was not also disputed that Tiwi Beach Resort burnt down in January, 2009 and business closed down with the result that all the employees were declared redundant. It was also not contested that business re-opened in October, 2012 under the name of Amani Tiwi Beach Resort that purported to employ new members of staff. The Judge found (and perhaps rightfully so) that although the hotel business burnt down the recognition agreement did not stipulate that it could be terminated through a fire that gutted down the hotel leading to the temporary closure of the hotel. Also the burning down of the hotel business could not terminate the recognition agreement that could only have been terminated in accordance with the provisions of **Section 54 (5)** of the **Labour Relations Act** or through an order of the court. This is what the Judge posited in his own words;-

> ***"If the respondent felt it was no longer bound by this agreement after the fire incident, it was open to the respondent to invoke the terms of the agreement, and terminate the agreement; the respondent had the option to petition the National Labour Board for revocation; or seek an order of the Court to the same end. None of these options was exercised, before respondent engaged with the Hoteliers Association and KUDHEIHA"***

[14] It is obvious a key factor that there was a change of entity after the hotel re-opened escaped the attention of the Judge and that is where we part company. The recognition agreement that was sought to be enforced was entered into by a different entity from the one that was sued. We do not find a clause in the recognition agreement transferring the responsibilities from Tiwi Beach Resort to the new entity that is Amani Tiwi Beach resort. Although the 1st respondent contended that the two companies are one and the same entity unfortunately each company in law is an independent body with its own soul and mind. See the ancient principle as enunciated in **Salmon vs. Salmon & Co. Limited [1897] AC 22.** This same principle is embodied in **Section 16(2)** of the **Companies Act Cap 486** Laws of Kenya which provides that;

> ***"From the date of incorporation mentioned in the Certificate of Incorporation , the subscribers to the memorandum together with such other persons as may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum, capable of exercising all the functions of an incorporated company, with power to hold land and having perpetual succession and a common seal, but with such liability on the part of the company in the event of its being wound up as is mentioned in this Act".***

[15] The appellant being a different entity had the liberty to enter into a recognition agreement with any union. We find there was no privity of contract or assignment thereto with Amani Tiwi Beach Resort. *Black's Law Dictionary*, 1999 Seventh Edition, at page 1217 defines privity of contract in the following terms:

> ***"The relationship between the parties to a contract, allowing them to sue each other but preventing a third party from doing so."***

See also *Halsbury's Laws of England, 4th Edition, Volume 9(1) Para748* that:

> ***"The general rule: the doctrine of privity of contract is that, as a general rule, at common law a contract cannot confer rights or impose strangers to it. That is, persons who are not parties to it. The parties to a contract are those persons who reach agreement and, whilst it may be clear in a simple case who those parties are, it may not be so obvious where there are several contracts, or several parties, or both, for example in the case of multilateral contracts; collateral contracts, irrevocable credits contracts made on the basis of the memorandum and articles of a company; collective agreements, contracts with unincorporated association; and mortgage surveys and valuation."***

Another useful dicta is also found in decision of the Court of Appeal in the case of **William Muthee Muthami vs. Bank of Baroda [2014] eKLR** where it held:

> ***"It is elementary learning, that as a general rule, according to the common law doctrine of privity of contract, rights and obligations under a contract are only conferred or imposed on the parties to that contract."***

[16] Accordingly we think we have said enough to demonstrate that since the entity that re-opened the hotel was different from the one that had executed the recognition agreement, they could not be held liable for actions by another entity. In the event we find merit in this appeal which we hereby allow with the result that the award and consequential orders made on 30th June 2017 are hereby set aside. We make no order as to costs considering the nature of the dispute and order each party to bear their own costs both in this Court and the one below.

Dated and delivered at Mombasa this 20th day of September, 2018.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M.K. KOOME

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR