



Kenya Hotels & Allied Workers Union v Sun Africa Hotels Limited & another; Kenya Union of Domestic, Hotels, Educational Institutions And Hospital Workers (Interested Party) (Cause 88 of 2023) [2024] KEELRC 1472 (KLR) (31 January 2024) (Ruling)

Neutral citation: [2024] KEELRC 1472 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE 88 OF 2023

M MBARŪ, J

JANUARY 31, 2024

BETWEEN

KENYA HOTELS & ALLIED WORKERS UNION CLAIMANT

AND

SUN AFRICA HOTELS LIMITED 1ST RESPONDENT

MGM MUTHU HOTELS 2ND RESPONDENT

AND

KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS AND HOSPITAL WORKERS INTERESTED PARTY

RULING

1. The claimant, Kenya Hotels & Allied Workers Union (KHAWU) filed application dated 1st January 2024 under the provisions of Articles 27, 28, 36, 41 and 47 of *the Constitution*, Section 3A and 63(e) of the *Civil Procedure Act*, Order 40 rule 1 and 2 of the *Civil Procedure rules* and seeking for orders that;
 1. Spent.
 2. Spent.
 3. The court be pleased to stay the implementation of the Settlement Agreement dated 13 July 2023 entered into between Sun Africa Hotels Limited on one part, Kenya Union of Domestic, Hotels, Betting, Educational Institutions and Hospital Workers (KUDHEIHA) on the second part and Staff representatives of individual hotels on the third part, pending the hearing and determination of the main suit.
 4. ...



5. The court be pleased to stay the implementation of the Minutes of the meeting dated 29 September 2023 entered into between MGM Muthu Hotels and KUDHEIHA, pending the hearing and determination of the main suit.
 6. ...
 7. The court be pleased to revoke and/or stay the implementation of the letters dated 29 November 2023 and “Re: Notice Of Retirement,” Issued To James Madaga, Harrison Mbiku Muthoka, James Kioko Kyumu, Ainea Shivachi Kalira And Fredrick Kamende Ndung’u pending the hearing and determination of the main suit.
 8. ...
 9. The respondents be restrained by way of a temporary injunction either by themselves, their employees, agents, servants, assignees or any person working under their express and/or implied instructions or authority from unfairly, unprocedurally and unlawfully, issuing notices and/or intention of retirement and further declaring the applicant’s members as redundant, pending the hearing and determination of the main suit.
 10. This court does grant any other relief that may be deemed appropriate in the interests of justice and fairness.
 11. Costs of this application be provided for.
2. The application is supported by the affidavit of Wycliffe Sava Mundu and on the grounds that the claimant filed application on 24 July 2023 at Nairobi registry where the court directed on 4 August 2023 that the matter be transferred to Mombasa registry and that KUDHEIHA be enjoined as an interested party. The court also directed parties to convene before the labour Officer in Mombasa with a view of amicably resolving the dispute and a mention in court on 19 September 2023.
 3. On the due date, 19 September 2023 the claimant and KUDHEIHA attended and noted that they had filed submissions before the Labour Officer. The 1st respondent requested for 7 days to file submissions but failed to comply and asked for more time and later indicated they would not appear before the Labour Officer.
 4. Pending the hearing of application dated 24 July 2023, the 1st respondent and KUDHEIHA convened a meeting on 29 September 2023 and together with the 2nd respondent agreed to the payment of;
 - a. Final dues compensation and settlement;
 - b. Notice of ending oral contracts; and
 - c. Written contracts.
 5. Among the orders sought in the application dated 24 July 2023 was to stay the implementation of the settlement agreement dated 13 July 2023 entered into between the 1st respondent, the interested party, and staff of individual hotels. The claimant also asked the court to restrain the respondents from terminating the employment of its members unlawfully.
 6. In his affidavit, Mundu aver that it has come to the attention of the claimant that the 2nd respondent has issued retirement notices, giving grievants No.6, 27, 94, 97 and 98 intentions to retire them with effect from 1st February 2024. The last working day being 31st January 2023. These notices indicate that the grievants have surpassed their retirement age with the 1st respondent at the time the 2nd respondent came into place and that their emoluments shall capture entitlement for the period commencing 1st



march 2022 and thereafter the 2nd respondent will bear no liability. Unless the orders sought are issued, the grievants will suffer loss and damage.

7. In reply, only the interested party filed a Replying Affidavit sworn by Hezron Onwong, the Industrial Relations Officer and aver that the 1st respondent is a member of the Union of Kenya Association of Hotelkeepers and Caterers and who has a Recognition Agreement with the interested party and several CBAs. The 1st respondent manages different units in Kenya being Keekorok Lodge, Sovereign Suites, Lake Naivasha Country Club and Nyali Sun African Beach Hotel and Spa Limited.
8. There are proceedings in ELRC Mombasa Cause No.924 of 2017 – *Gerald Mwoja & 23 others v Nyali Sun Africa Hotel and Spa Limited consolidated with Cause* No.49 of 2020 – *KUDHEIHA v Nyali Sun Africa Hotel and Spa Limited*.
9. The Settlement Agreement does not relate or affect the employees of the claimant as noted in the minutes of 19 January 2023 and the Settlement Agreement of 13 July 2023. The claimant cannot seek to stay an agreement in which they are not parties. The agreement does not affect the members of the claimant as alleged and the application before court should be dismissed with costs.
10. Parties attended court and made oral submissions.
11. The claimant submitted that the 2nd respondent has issued retirement notice to several grievants taking effect on 1st February 2024 and the last day at work is noted as 31st January 2024. These grievants are subjects in the main claim which shall be negated if the notices are not stayed pending the hearing of the claim herein. The respondents should be restrained from declaring any redundancy or retiring the grievants. Following minutes of 29 September 2023, the question of final dues and notice to end contracts has not been resolved. The subject minutes affect all employees of the 2nd respondent and not just the members of the interested party.
12. In reply to the application, the interested party has alleged that the minutes of 19 January 2023 and Settlement Agreement of 13 July 2023 only relates to its members but a reading of the same can confirm that all employees of the 2nd respondent are affected. The minutes affect all staff and there is no differentiation of 1st respondent employees or the interested party members. The grievants' pay slips show the 2nd respondent is deducting trade union dues to the claimant since there is membership with the claimant.
13. The claimant submitted that the letters of retirement and termination of employment take effect on 1st February 2024 without the participation of the grievants and the court should maintain the status quo to allow the claim herein be heard on the merits as termination of employment will render the same nugatory. The rights of the grievants will be lost since they are being targeted and victimised for being members of the claimant union.
14. The 1st respondent submitted that the claimant has failed to address the need to have the various suits mentioned consolidated to allow the court to have a full perspective of all matters herein between the parties, the 2nd respondent has not been served so as to attend and defend itself and the material presented in court is not sufficient to persuade the court to grant the orders sought. For fair determination of the matter, the court should dismiss the application.
15. The interested party submitted that the matters between the 1st respondent and transition of employees is pending in court and was not discussed during negotiations that resulted in the Settlement Agreement on 3 July 2023 between the 1st respondent and the interested party. It was agreed that the 2nd respondent should take over the management of the company from 1st March 2023 and all liabilities to remain with the 1st respondent. The 2nd respondent has no liability and the filing of this case was



meant to cause disharmony whereas there exists ELRC Cause No.924 of 2017 and 49 of 2022. The grievants in this case are the same save for those employed after the year 2020.

16. The interested party submitted that the Conciliator's report makes recommendations after hearing all parties and the claimant has filed this suit in abuse of court process to cause confusion. The claimant has also sought COTU which wrote a letter to the 2nd respondent giving ultimatum while well aware that this matter is in court.
17. The interested party members have been paid in full save for those working with the 1st respondent because of this suit. the case of alleged discriminatory treatment does not apply as the interested party has taken care of the claimant's members and the instant application should be dismissed.

Determination

18. The issues which arise herein are whether the court should stay the implementation of the Settlement Agreement dated 13 July 2023 and the Minutes of the meeting dated 29 September 2023; whether the respondents should be restrained from terminating the employment of the grievants through retirement, redundancy or otherwise.
19. The claimant moved the court under Certificate of Urgency on 24 July 2023 and the cause of action was, the grievants, being employees of the 1st respondent, Sun Africa Hotels Limited, learnt that the business was taken over by the 2nd respondent, MGM Muthu Hotels through a Settlement Agreement dated 13 July 2023 entered between the 1st respondent and the interested party together with Staff Representatives of individual hotels on the third part.
20. The claimant's case is that it was not present at meetings culminating in the Settlement Agreement. The Agreement related to the payment of final terminal dues to employees of the 1st respondent up to 28 February 2022. The payment related to termination of employment on the grounds of retirement and that the 1st respondent would be discharged from all liabilities as at 28 February 2022.
21. The claimant is hence seeking orders that the declaration of redundancy by the 1st respondent be held to be unfair and unlawful, payment of terminal dues and issuance of Certificates of Service.
22. The claimant is hence seeking orders staying the Settlement Agreement dated 13 July 2023 between the 1st respondent and the interested party, KUDHEIHA and Staff Representatives of individual hotels. The claimant is also seeking to stay the implementation of minutes of the meeting dated 29 September 2023 between the 2nd respondent and the interested party. Further, the claimant is seeking to stay the implementation of the notices dated 29 November 2023 retiring several grievants from their employment with effect from 1st February 2024 and that the respondents be stopped from terminating the employment of the claimant's members through retirement and redundancy.
23. At the core of the instant application is the notices of retirement dated 29 November 2023 which were precipitated by the Settlement Agreement dated 13 July 2023 and the meeting dated 29 September 2023. The jurisprudential question that arises regarding the Application dated 1st January 2024 is whether the Settlement Agreement and the minutes should be stayed pending the hearing of the main claim. As held in the case of *Rutto v Maritim* (Environment & Land Case 19 of 2016) [2023] KEELC 15958 (KLR), a consent or agreement between parties can only be set aside for illegality, fraud, misrepresentation and coercion. An agreement between parties must be placed before the court for adoption for its to become an order of the court and be subject for enforcement. Hence, the Settlement Agreement remains a binding agreement between the parties to it. A third party can only secure its rights through court by asserting its rights which must be articulated and addressed on the merits.



Foundationally, the elements of illegality, fraud, misrepresentation and or coercion must be gone into for the court to address on the merits.

24. In the case of *Murtaza Hassan & Another v Ahmed Slad Kulmiye* [2020] eKLR the court held that the court will only interfere with an agreement on grounds of duress, coercion, misrepresentation, mistake or fraud and undue influence. A third party to an agreement must therefore be called to account in this regard where an agreement unrelated to it is challenged.
25. In this case, the claimant has made a case to the effect that the Settlement Agreement included the 1st respondent and the interested party together with Staff Representatives of individual hotels. Indeed, the agreement has the following;
 - Wilson Kapio – KKL shop steward;
 - Andrew Niete, Keekorog Chairman;
 - Kilerai Emmanuel, shop steward;
 - George Kireria, SS chairman;
 - Samuel Staka, LNCC shop steward.
26. The list of terminal dues attached to the Memorandum of claim relates to redundancy payments including the following;
 1. Number of years worked;
 2. Number of days worked;
 3. Pending leave days;
 4. Salary arrears;
 5. Service charge;
 6. travel allowances;
 7. Uniform refund;
 8. Severance pay;
 9. Gratuity; and
 10. Notice pay.
27. Cumulatively, where termination of employment is alleged to be unfair on account of redundancy, the court is then invited to assess such a claim on the basis of the law particularly the motions of Section 40 of the *Employment Act*, 2007. Equally, where a retirement notice is issued, the court is called to look at the foundational documents with regard to the employment relationship, the contract of service, the Collective Bargaining Agreement (CBA) and the policy of the employer. The claimant's case is that its members have been issued with retirement notices wrongfully and unlawfully and to ascertain the same, affidavit evidence would not assist the court in wholly and fully determining the contested facts. Evidence should be called to allow the court to interrogate the entire record.
28. Parties particularly the claimant and interested party appreciate that the Conciliator has had opportunity to hear them and a report from this office is pending. Even though the 1st respondent has not attended before the conciliator and the 2nd respondent has failed to attend in these proceedings, it is imperative that the court is seized of the facts finding by the conciliator moving forward.



29. Ultimately, whether to issue interim orders or not particularly an injunction restraining the respondents from terminating employment on account of redundancy and retirement has to do with the court considering the balance of convenience and also consider whether in the event a party is successful, damages would be payable. In the case of *Joseph Siro Mosioma v Housing Finance Company of Kenya Limited & 3 Others* [2008] eKLR and in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR the court held that;

... the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy ...

30. And in the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR where the court held that;

The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer? In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.

31. In this case, a full hearing of the claim will ascertain whether the declaration of redundancy and the terminal dues paid to all employee affected are lawful and commensurate to the CBA between the parties. Additionally, the court will have a chance to determine whether the retirement notices are justified. Other than the CBA and written contract, the impugned Settlement Agreement and the Minutes, at the disposal of the claimant is the provisions of Section 49 of the *Employment Act, 2007* and the plethora of remedies therefrom. Where there is a finding of procedural or substantive unfairness, the grievants’ claim will be assessed and allocated as appropriate. On the other side, where there is a finding that the Notices of retirement are justified, the 2nd respondent will not have incurred unnecessary costs to sustain the employment relationship.

32. Therefore, to ensure justice for all the parties, orders sought shall not issue. The court will hear the claim on priority basis. For this purpose, the claimant and the interested party shall pursue the conciliator’s report for the next 14 days and attend court to confirm and take further directions.

33. Mention on 14 February 2024.

34. Orders accordingly.

DELIVERED IN OPEN COURT AT MALINDI THIS 31ST DAY OF JANUARY 2024.

M. MBARŪ



JUDGE

Upon delivery of the ruling in open court, parties have agreed and confirmed the hearing date for 12 February 2024.

Directions herein issued and noted in the physical court file.

DELIVERED IN OPEN COURT AT MALINDI THIS 31ST DAY OF JANUARY 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Nasra

