



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

ELRC CAUSE NO. E 446 OF 2021

BEATRICE ONDIEKI.....1ST CLAIMANT
MARIA NJOROGE.....2ND CLAIMANT
RACHEL LAGAT.....3RD CLAIMANT
JAMES MWANIKI.....4TH CLAIMANT
SILVESTER OKENO.....5TH CLAIMANT
JOSEPHINE KINYALI.....6TH CLAIMANT
HARRIET NGONYO.....7TH CLAIMANT
VICTORY MUTEGLI.....8TH CLAIMANT
SALLY CHEBOI.....9TH CLAIMANT
JEMIMA MUEMA.....10TH CLAIMANT
JOSHUA NDAMBUKI.....11TH CLAIMANT

VERSUS

LAICO REGENCY HOTEL NAIROBI.....RESPONDENT

RULING

1. The applicant vide application dated 31st May, 2021 prays for an order:-

1. Spent

2. Spent

3. That pending the hearing and determination of the main suit herein, the Court be pleased to order the Respondent to deposit Kshs 51,146,352 and/or any other sufficient property in Court (or in an interest earning account to be held by both the claimant's and Respondent's Advocates, to satisfy the claimant's claims against the Respondent as particularized in the statement of claim filed herein dated May, 31,2021.

4. Spent

5. That pending the hearing and determination of the main suit herein, the Court be pleased to make an order directing an independent Valuer designated by Court, to enter into the premises of the Respondent along Uhuru Highway – Nairobi for purposes of taking inventory of all the properties/assets currently held by the Respondent's Hotel business and report back to the Court within

14 days from the date of this order.

6. That the respondent be restrained from in any way and in any manner whatsoever selling, transferring and/or disposing of the property currently held by its Hotel business along Uhuru Highways Nairobi pending the hearing and determination of the suit.

7. That the Court issue a mandatory injunction compelling the respondent to resume making the requisite monthly payments of the claimant's salaries and/or all employment benefits payable to the claimants.

2. The application is premised on grounds set out in the notice of motion and in the supporting affidavit of the 1st claimant, the nub of which is that the claimants are employees of the Respondent's Hotel. That by a memo dated 6/3/2020, the respondent informed all employees that it had temporarily closed its operations due to COVID-19 pandemic and the employees were placed on a mandatory discretionary leave without pay for initial period of 30 days effective 1/4/2020 that was extended to 1/6/2020; and indefinitely by a memo dated 6/9/2020.

3. That the claimant's union **KUDHEIHA** has since intervened in the matter and no solution has been found.

4. That on 7/4/2021, **KUDHEIHA** and the respondent entered into a mutual separation agreement dated 7/4/2021 which is unlawful as it contravenes the existing Collective Bargaining Agreement and was negotiated without input of the claimants.

5. That the Respondent has been forcing the claimants to resign so that it can pay the terminal benefits agreed to with **KUDHEIHA**.

6. That if the prayers sought are not granted, the claimants stand to lose all the accrued gains vide the Collective Bargaining Agreement for the years 2017/2018; and 2019/2020 which increments are still unpaid and due and owing to the claimants.

7. That there is no hope of the hotel opening again due to United Nations Security Council's sanctions on the Respondent's parent company (**LAICO**) following Civil war in Libya.

8. That the application be granted.

9. The application is opposed vide replying affidavit of Jamal Ahmed the Caretaker Manager of Laico Regency Hotel. The respondent admits having employed the claimants. The respondent also admit having closed the operations of the hotel due to financial difficulties precipitated by the civil war in Libya from the year 2011 and exacerbated by the COVID 19 pandemic in the year 2020.

10. The notices to the employees for unpaid compulsory leave are admitted due to closure of the Hotel operations due to Covid-19 restrictions. The negotiations with **KUDHEIHA** and the separation agreement in which negotiated terminal benefits are set out and are being paid out to lay off employees is also admitted.

11. That in terms of the agreement, payment of terminal benefits was premised upon employees tendering their resignations. In terms of paragraph 19.1 of the replying affidavit the respondent states that the unpaid Collective Bargaining Agreement increments would be paid at 10% for the period October, 2017 to December, 2018; 10% from January, 2019 to December, 2019 and 8.5% salary increment from January, 2020 to March 2020.

12. In addition the employees would be paid Ex-gratia pay as per individual grades as follows:-

(a) Jobs grade 1 to 3 – Kshs. 6,000

(b) Jobs grade 4 to 5 – Kshs 6,000

(c) Jobs grade 6 to 9 – Kshs 7000

13. Furthermore, payment in lieu of untaken leave and public holidays, travelling allowance; service charge for the month of March, 2020 at Kshs 3,100, uniform allowance due and night shifts would be paid.

14. In terms of the agreement, gratuity was payable at 4.75 months' salary for employees that had worked for over 10 years, 3 months' salary for those who had done 9 years; 2.67 month's salary for those who had worked for 8 years; 2 months' salary for those who had worked for 6 years; 1.67 months' salary for those who had done 5 years and 1 month salary for those who had worked for a period of 2 years.

15. The respondent therefore denies allegations by the claimant that the separation Agreement was comprised of the Collective Bargaining Agreement salary increments.

16. The respondent states that closure of operations is beyond its control. That it is nonetheless committed to make all payments and the application lacks merit and it be dismissed.

17. The respondent has also filed a defence to the statement of claim and states that there is no evidence that it intends to leave Kenya as alleged or at all.

Determination

18. The parties filed their respective submissions and the issue for determination is whether the applicant has satisfied the prerequisite for grant of an order of attachment before judgment and other mandatory and injunctive reliefs sought.

19. With respect to the prayer for attachment before judgment, the Court refers to the provisions of Section 63 of the Civil Procedure Act and Order 39, Rule 5 of the Civil Procedure Rules, 2010.

20. **Order 39, rule 5 provides:-**

“5(1) where at any stage of the suit the Court is satisfied, by affidavit or otherwise that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him:-

a. Is about to dispose of the whole or any part of his property.

b. Is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court, the Court may direct the defendant within a time to be fixed by it, either furnish security, in such sum as may be specified in the order to produce and place at the disposal of the Court, when required, the said property, on the value of the same or such portion thereof, as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

21. The Court has considered the deposition by the applicant and the rebuttal by the respondent and finds that the applicant has not satisfied the Court that the respondent has any intent to obstruct or delay the execution of any decree that may be passed against it.

22. To the contrary the respondent has demonstrated immense goodwill in difficult COVID-19 environment to enter into a mutual separation agreement with the union that has the exclusive authority to negotiate on behalf of all unionisable employees of the terms and conditions of service including any terminal benefits payable upon closure of the enterprise for operational reasons.

23. There is no evidence before Court that the respondent intends to dispose its property and/or is in the process of removing its fixed assets from the jurisdiction of Kenya. The applicant has failed to discharge this onus. Indeed, the respondent is paying all the agreed terminal benefits upon separation with its employees. The applicant has failed to demonstrate otherwise. The prayer for attachment before judgment therefore fails. See the case of **Liu Ching Liang –vs- Webwave Electric Manufacturing (K) Co. Ltd. & 2 Others [2016] eKLR.**

24. Pursuant to the above finding, the Court also finds that the applicant has failed to establish a *prima facie* case with a probability of success to warrant grant of a mandatory injunction against the respondent to continue paying full salaries to its employees when it has closed its operations for reasons beyond its control.

25. The applicant has equally failed to establish that it would suffer irreparable loss not remediable by way of damages if the injunctive relief sought is not granted. See **Giella –vs- Cassman Brown Co. Limited Company Limited 1973, E.A. 358.**

26. Accordingly, the application fails in its entirety with costs in the cause.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 30TH DAY OF SEPTEMBER, 2021

MATHEWS N. NDUMA

JUDGE

Appearances

Morara Omoke Advocates for the claimant

Wetangula, Adan & Co. Advocates

Ekale – Court Assistant