REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 105 OF 2004

KENYA HOTELS & ALLIED WORKERS UNION.....CLAIMANT

-VERSUS-

NAIROBI SAFARI CLUB.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 6th March, 2020)

RULING

The claimant filed the application on 15.03.2019 through Ng'etich Chiira & Associates Advocates. The application was by the notice of motion under section 3A of the Civil Procedure Act and section 32 of the Employment and Labour Relations Courts Act. The application was for orders:

a. The application be and is hereby certified urgent and service be dispensed with in the first instance.

b. The Honourable Court is pleased to fix the matter on a priority basis for purposes of taking directions.

c. The Honourable Court is pleased to interpret and clarify the terms of the judgment and decree herein read and delivered on 12.08.2005 before the Industrial Court of Kenya sitting at Nairobi in Cause 105 of 2004.

d. The Honourable Court be pleased to calculate the amounts payable to each member of the claimant as per the award.

e. The costs of the application and the main suit be borne by the respondent.

f. The Honourable Court be pleased to make such further orders as it may deem fit.

The application is based on the annexed supporting affidavit of Albert Ogema filed on 14.03.2019 and his further supporting affidavit filed on 22.10.2019. The grounds in support of the application are as follows:

a. The Industrial Court (then being a tribunal) made an award in favour of the claimant as delivered by Jaffer J on 12.08.2005. The respondent was ordered:

i. To give each of the grievants in the dispute an opportunity to be reinstated in their original positions without loss of any benefits save that if they so opt for reinstatement, they shall not receive any salary and related benefits for the period they have been out of employment, namely between 27th December 2000 and the 1st August 2005 being the effective date of reinstatement; or alternatively:

ii. The grievants and each of them, upon not taking up reinstatement, be paid their normal terminal dues in accordance with the CBA in force at the time.

b. The claimant wrote to the respondent on 22.08.2005 and on 08.09.2005 seeking to implement the order on reinstatement but there was no positive reply on the part of the respondent.

c. Instead the respondent filed an application formerly HCMCA No.1349 of 2005 (OS) in the High Court at Nairobi and later ELRC J.R. No. 4 of 2015 at the Employment and Labour Relations Court at Nairobi (**Mukawa (Hotels) Holdings Limited T/A Nairobi Safari Club –Versus- Industrial Court of Kenya and 2 Others**) to challenge the award by the Industrial Court. Pending the

hearing and determination of the Judicial Review Application, The High Court ordered stay of execution of the award by the Industrial Court in the matter. Judgment in the application was delivered by Nduma PJ on 28.04.2017 when the application was dismissed with costs of the proceedings before the trial court and this Court.

d. That the members of the claimant or applicant trade union have been unable to execute the award because the terms of the award are not clear and time had lapsed due to the application that was filed in the High Court and subsequently decided by this Court (Nduma PJ's Judgment).

e. The applicant seeks interpretation of the award and the decree flowing from the award because they were not reinstated and they were not paid terminal benefits.

f. The collective agreement (CBA) between the Kenya Union of Domestic Hotels, Educational Institutions (KUDHEIHIA) which was recognised by the respondent as at the time of the award has over the years changed with variations made to the salary scales which largely affect the interpretation of the award.

g. The claimant has computed and particularised the amounts due to the grievants per exhibit AO-1b on the supporting affidavit in the presupposing that the claimants were constructively reinstated from August 2005 to January 2019 being 162 months and that the CBA as it changed over the years applied. The computation does not state the sum of the amount payable to the 68 grievants but a glance at the amount as calculated shows that each of the 68 grievants would receive not less than Kshs.5, 000, 000.00.

The respondent opposed the application by filing the grounds of opposition on 13.06.2019 through Oraro & Company Advocates. The respondent also filed the replying affidavit of Lilian Joy Nyagaki Githunguri sworn on 16.09.2019. The grounds of opposition are as follows:

a. The execution of the decree is time barred as the same is being done after 12 years from the date when the judgment was delivered on 12.08.2005.

b. The execution of the decree will be unlawful and unfair to the judgment debtor, the respondent.

c. The interpretation and tabulation of the award by the claimant is time barred.

d. Any action by the claimant to give effect to the judgment is bad in law.

e. The claimant's actions are in bad faith and abuse of the Court process.

f. At paragraph 15 of the replying affidavit it is stated thus, "**15. That the respondent declined to reinstate the grievants and maintained the position that the grievants were terminated from employment on 27.12.2000.**" Further at paragraph 19 it is stated that the decree flowing from the award was issued on 22.11.2018.

g. The award was delivered on 12.08.2005 and the execution is time barred as is being sought after 13 years from the delivery. The claimant is guilty of prolonged, inordinate and inexcusable delay in executing the decree and that equity does not aid the indolent therefore the claimant's failure to take any steps amounts to an abuse of the process of the court. The respondent's key employees have left the respondent's employment and the applicant will rely on minimal documentation to implement the award.

h. Without prejudice to the foregoing grounds, the respondent has reviewed and analysed the award and the computation by the applicant is based on wrong assumptions and calculations. The respondent has tabulated the normal dues the claimant would have received under the CBA in force at the relevant time being the CBA with KUDHEIHIA which came into effect on 01.01.2004. The tabulation as based on that CBA and the award dated 12.08.2005 is exhibited on the replying affidavit as exhibit AM-7. The tabulation shows the amount due to all the 68 grievants being in the sum of **Kshs.5, 650, 761.95**. The tabulation also particularises the amount owed or due to each claimant accordingly.

i. The amounts tabulated and alleged for the claimant to be due on the headings of service charge, leave travelling allowance, and public holidays are entitlements to employees only while working for the respondent and in the case of the grievants they were summarily dismissed on 27.12.2000 and the award only provides that the grievants to be paid the normal terminal dues in accordance with the CBA in force at the relevant time. If the claimant is entitled at all, it is entitled as per the computation in AM-7.

j. The claimant has computed and is claiming a colossal amount of money from the respondent and if granted, the respondent will be forced to terminate the employment of further staff.

The Court has considered the application, the affidavits, the exhibits and the written submissions filed for the parties. The Court makes findings as follows.

First, the Court finds that the applicant is not guilty of inordinate and inexcusable delay in filing the application. The award was given on 12.08.2005. The claimant wrote to the respondent to implement the reinstatement order. Instead the respondent filed to challenge the award at the High Court. On 15.09.2005 the High Court ordered stay of implementation of the award until further orders. There is no dispute that the stay orders remained in place until Nduma PJ delivered the Judgment on 28.04.2017. On 09.10.2017 the claimant wrote to the respondent to convene a meeting to discuss the way forward. On 29.11.2017 the claimant's advocates wrote to the respondent explaining their considered effect of the Judgment by Nduma PJ. The claimant's advocates wrote to the respondent on 22.12.2017 with concerns that they had received no response from the respondent. It is not clear on the steps taken in 2018 but the application was filed on 15.03 .2019. The effective date of lapsing of the stay orders was on 28.04.2017 when the Judgment was delivered. Thus the Court returns that execution could

not take place until after that date. The Court finds that it was misconceived for the respondent to state that execution was coming after 13 years from the date of the award whereas clearly the respondent enjoyed the stay orders. The Court considers that the application is filed in the suit for satisfaction of the decree and it does not therefore amount to a fresh suit based on the award – so that 12 years of limitation in section 4(4) of the Limitation of Actions Act for suits based on a decree or judgment or court order did not apply. Even if the claimant has failed to account for steps taken in 2018, the Court finds that no statutory provision has been cited that would operate to bar the claimant from filing the application and seeking interpretation towards satisfaction of the award and the ensuing decree.

Second, the terms of the orders in the award are clear on the issue of the reinstatement. The respondent was ordered to **give each of the grievants in the dispute an opportunity to be reinstated in their original positions without loss of any benefits save that** if they so opted for reinstatement, they shall not receive any salary and related benefits for the period they have been out of employment, namely between 27th December 2000 and the 1st August 2005 being the effective date of reinstatement. The Court finds that first, the respondent was to give the opportunity and then the individual grievant would opt to get reinstated or not –those were the two steps or conditions in the reinstatement and the Court finds that if any of the two failed to occur, then the reinstatement order collapsed. It is clear to the Court that the respondent refused to give the opportunity as per paragraph 15 of the replying affidavit where it is stated thus, "**15. That the respondent declined to reinstate the grievants and maintained the position that the grievants were terminated from employment on 27.12.2000.**" The Court finds that the respondent having taken that position and in view of the temporary stay of execution of the award as ordered by the High Court, the reinstatement limb of the award was thereby frustrated or collapsed. It is arguable that the reinstatement order was self-executory and when the respondent refused to give the opportunity, then the grievants stood constructively reinstated. However, in the letter dated 22.08.2005 by the claimant to the respondent, the claimant stated that it had instructed all its employees to report to the respondent to exercise the option to get reinstatement and for those opting otherwise, their terminal dues were to be discussed. The letter then stated, "**Please kindly advice on the number that have taken up their reinstatement.**" The Court finds that on the material on record it is difficult to determine those of the grievants that reported and asked the respondent to reinstate them. Thus the Court returns that by the conduct of the respondent stating that it declined to reinstate the grievants and there being no evidence of any of the grievants who opted to be reinstated, the order on reinstatement, even if it was self-executory, thereby collapsed.

Third, the Court therefore returns that the order on reinstatement having collapsed, the only order available for execution is the alternative one in the award. The alternative award was that the grievants and each of them, upon not taking up reinstatement, be paid their normal terminal dues in accordance with the CBA in force at the time. The terms of the order are clear. The applicable CBA was the one in force at the time of the award. The Court has already found that the claims for constructive or otherwise reinstatement do not apply as urged for the claimant. The Court finds that in view of the terms of the order on the applicable CBA, it was misconceived to be urged and submitted for the claimant that the terms of the CBA as changed over time after the award applied. The Court finds accordingly, that the applicable CBA was as the time of the award.

Fourth, the claimant's objection to the computation by the respondent as per exhibit AM-7 of the replying affidavit showing the amount due to all the 68 grievants being in the sum of **Kshs.5, 650, 761.95** has been found unjustifiable. In particular the Court has found that the changes to the CBA or subsequent CBA did not apply by reason that the order in the award by itself determined the applicable CBA to be the one prevailing as at the time of the delivery of the award. The claimant has not raised objections to the calculations in exhibit AM-7. The Court upholds the respondent's submission that the amounts tabulated and alleged for the claimant to be due on the headings of service charge, leave travelling allowance, and public holidays are entitlements to employees only while working for the respondent and in the case of the grievants they were summarily dismissed on 27.12.2000 and the award only provided that the grievants to be paid the normal terminal dues in accordance with the CBA in force at the relevant time. Accordingly the Court returns that to each grievant the respondent will pay the normal terminal dues as particularised in exhibit AM-7 of the replying affidavit amounting to a sum of sum of **Kshs.5, 650, 761.95**. The Court has considered all circumstances of the case and the time it has taken to resolve the dispute and considers that it will be just and proportionate for the respondent to pay the money due by 01.07.2020 failing interest to run thereon at court rates from the date of the award until payment in full.

Fifth, the claimant has prayed for costs of the application and the main suit. The Court considers that the issue of the costs of the suit was conclusively decided when Nduma PJ in the Judgment delivered on 28.04.2017 in J.R No. 4 of 2015 ordered, "**68.For these reasons the court finds that the constitutional reference by the applicant was ill conceived and without merit. The same is dismissed with costs of the proceedings before the trial court and this court.**" As for the application, the Court returns that the claimant has substantially succeeded and is awarded the costs.

In conclusion, the application filed herein for the claimant on 15.03.2019 and dated the same date is hereby determined with orders:

1. In satisfaction of the award given on 12.08.2005 by Murtaza Jaffer J, the respondent shall pay to each grievant the normal terminal dues as particularised in exhibit AM-7 of the replying affidavit herein amounting to a sum of sum of **Kshs.5, 650, 761.95**.

2. The respondent to pay the money due in order (1) above by 01.07.2020 failing interest to run thereon at court rates from the date of the award until payment in full.

3. The respondent to pay the applicant's costs of the application.

Signed, dated and **delivered** in court at **Nairobi** this **Friday, 6th March, 2020.**

BYRAM ONGAYA

JUDGE