



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 67 OF 2007**

**KENYA HOTELS AND ALLIED**

**WORKERS UNION.....CLAIMANT**

**-VERSUS-**

**HOTEL INTERCONTINENTAL.....RESPONDENT**

**-AND-**

**KENYA ASSOCIATION OF**

**HOTEL KEEPERS AND CATERERS.....1<sup>ST</sup> INTERESTED PARTY**

**KENYA UNION OF DOMESTIC, HOTELS,**

**EDUCATIONAL INSTITUTIONS, HOSPITALS**

**AND ALLIED WORKERS UNION.....2<sup>ND</sup> INTERESTED PARTY**

*(Before Hon. Justice Byram Ongaya on Friday 3rd July, 2020)*

**RULING**

The claimant filed an application on 27.05.2019 through its Deputy Secretary General one John Simiyu. The application was by the notice of motion under sections 12 and 13 of the Employment and Labour Relations Court Act Cap. 234B, rule 31 of the Employment and Labour Relations Court (Procedure) Rules, section 57 and 73 of the Labour Relations Act, 2007 and other enabling provisions of the law. The claimant prayed for substantive orders as follows:

- a) That the Court be pleased to issue execution order and cite the General Manager of the respondent one Oliver Geyer and the General Secretary of the 2<sup>nd</sup> interested party one Albert Njeru for contempt of the Honourable Court's orders.
- b) That the Honourable Court be pleased to execute its orders as per section 13 of the Employment and Labour Relations Court Act, Cap 234B laws of Kenya.

The application is based on the annexed affidavit of Wycliffe Sava Mundu, the claimant's Secretary General, and upon the following grounds:

- a) On 08.04.2008 the Court delivered judgment in the suit and directed the respondent to accord formal recognition to the claimant and sign the recognition agreement in 3 months.
- b) On the same 08.04.2008 the Court ordered the 2<sup>nd</sup> interested party to amend rule 3(a) of her constitution by deleting the words hotels, restaurant, casinos, catering and similar establishments providing lodging, food, beverages, or both and further categories of related establishments providing tourism services.
- c) The Court also ordered an end of litigation between two rival unions in the hotel sector for the sake of industrial peace to enhance ILO policy of one union one industry.

- d) That the Court issued a decree over the same judgment on 25.10.2015 which was served upon the respondent on 03.02.2017.
- e) That defiantly, the respondent with impunity and in collaboration with the interested parties subjected the claimant's members to agency fee deduction in favour of the 2<sup>nd</sup> interested party to frustrate the claimant's members.
- f) Between February and April 2019 the claimant embarked on fresh recruitment and once more surpassed the simple majority rule hence maintaining the status quo that it be recognised by the respondent.
- g) On 05.05.2019 the claimant requested the respondent to comply with court orders by signing the recognition agreement but the respondent declined.
- h) It is evident that the respondent and the 2<sup>nd</sup> interested party have with impunity declined to obey the aforementioned Court orders.
- i) The Court has power to summon the respondents' and interested parties' agents within the Civil Procedure Act.
- j) The Court orders are valid and binding to all parties to date.

The 1<sup>st</sup> interested party filed on 20.08.2019 the replying affidavit of Mike Macharia, the Executive Officer of Kenya Association of Hotel Keepers and Caterers (KAHC). C.M Ongoto & Company Advocates acted for the 1<sup>st</sup> interested party. The 1<sup>st</sup> interested party urged as follows:

- a) The prayers the claimant is seeking are similar to the ones the claimant applied for in the notice of motion that was dismissed on 06.11.2015.
- b) That many employers in the hotel sector are still committed members of the 1<sup>st</sup> interested party and the claimant has majority of members in a single hotel. The same cannot be said to amount to the threshold required for recognition which is 50% of the of the 1<sup>st</sup> interested party's member organization.
- c) The issues the claimant has raised in the present application were canvassed and determined in petition 5 of 2013 as well as civil application No. 21 of 2017.

The respondent filed on 20.09.2019 the replying affidavit of Oliver Geyer, the General Manager. Walker Kontos Advocates acted for the respondent. It was urged as follows:

- a) The decree in issue has been signed by the Deputy Registrar of the Court whereas the Court never dealt with the matter. The matter was heard and determined by the former Industrial Court and no explanation was given why the Court's Deputy Registrar signed the decree. The decree is expressed as a decree of the Employment and Labour Relations Court which is not the case. The date of decree does not conform the date of the judgment. Thus the application is fatally defective and is for striking out *in limine*.
- b) The application is premature because it relates to the right of recognition which under section 54 (6) of the Labour Relations Act, 2007 should be referred to conciliation.
- c) The maker of the affidavit joined the respondent on 01.01.2016 and as at the time of the decree he was not the respondent's employee. He became aware about the order when he received the claimant's letter dated 06.03.2019. The judgment in issue was given in 2008 by the then Industrial Court then a court lower in status than the High Court and the present Employment and Labour Relations Court as presently constituted. The order was that the respondent to grant recognition to the claimant as the appropriate union to represent the rights of the respondent's unionisable employees. Further, the 2<sup>nd</sup> interested party herein KUDHEIHA, to duly amend rule 3 (a) of its constitution by deleting the words hotels, restaurant, casinos, catering and similar establishments providing lodging, food, beverages, or both and further categories of related establishments providing tourism services. By terms of the order, the respondent could enter a recognition agreement with the claimant if the 2<sup>nd</sup> interested party effected the amendment as ordered. On 06.11.2015 a bench of three Judges of the Court declared that preventing the 2<sup>nd</sup> interested party herein from representing unionisable employees in the hotel industry would amount to infringing on the right of the 2<sup>nd</sup> interested party and the unionisable employees in the hotel industry to their freedom of association. By that decision by the Court, the decree the claimant seeks to enforce has been overtaken by events.
- d) To be granted recognition the claimant must fulfil the provisions of section 54 of the Labour Relations Act, 2007 on requirements for recognition. The claimant has failed to meet the requirements because the majority of the respondent's unionisable employees are members of the 2<sup>nd</sup> interested party with whom a recognition and collective agreements are in place; by letter dated 06.05.2019 the claimant purports to have recruited 206 of the respondent's unionisable employees but the recruited employees have never resigned from the 2<sup>nd</sup> interested party per section 48 of the Act so that the employees are still members of the 2<sup>nd</sup> interested party; the respondent is a member of the 1<sup>st</sup> interested party who have signed recognition and collective agreements with the 2<sup>nd</sup> interested party on behalf of the respondent; and there is no case for the respondent to recognise the claimant.
- e) The claimant such as by the letter dated 13.03.2019 has mislead the respondent's unionisable employees that the claimant and not the 2<sup>nd</sup> interested party is the employee's proper and lawful union. The recruitment by the claimant was illegal.
- f) Agency fees has been deducted from unionisable employees not being members of the 2<sup>nd</sup> interested party on account of the

prevailing collective agreement with the 2<sup>nd</sup> respondent.

g) The application dated 24.05.2019 should therefore be dismissed with costs.

Parties filed their respective submissions. The Court has considered the parties' respective submissions and cases and makes findings as follows:

1) The former Industrial Court delivered the award herein on 08.04.2008. As to whether the claimant would be barred recognition by the respondent on account of unity of the members of the 1<sup>st</sup> interested party, the award stated, **"...In our view, we cannot deny the first union recognition by the Hotel for the sake of unity of the Association's members. After all, the Demarcation Committee had recommended as stated herein above that hotels and restaurants which are members of the Association, should negotiate individual agreements with the union that fulfils the simple majority rule."**

2) The former Industrial Court in the award found that the claimant had satisfied the requirements under section 5 (2) of the Act (Trade Disputes Act now repealed) for recognition by the respondent and awarded that the respondent accord the formal recognition to the claimant as the appropriate union to represent the interest of its unionisable employees. It was ordered that parties sign a formal recognition agreement within three (3) months from the date of the award for purposes of collective bargaining. The Court therefore returns that within the findings of the former Industrial Court the claimant had satisfied requirements for recognition and which was ordered to be concluded within 3 months. The Court finds that it was misconceived for the respondent to urge that the recognition as ordered was subject to section 54 of the Labour Relations Act, 2007 and that any disputes about the recognition as was awarded were to go to conciliation – and the Court finds that the award was conclusive on the issue of recognition. The Court finds that the award was clear that the parties were ripe for signing a recognition agreement as was awarded.

3) As for the 2<sup>nd</sup> respondent, the award was clear thus, **"...we recommend the 2<sup>nd</sup> union do amend Rule 3 (a) of its Constitution by deleting the words..."** Thus the Court finds that the award by its own wording and terms it made a recommendation and the Court finds that the same did not amount to a compulsion. The Court therefore finds that the claimant has not established disobedience of the award by the 2<sup>nd</sup> interested party in event the 2<sup>nd</sup> interested party failed to heed or follow the recommendation. Being a recommendation there was no compulsion and there cannot be any disobedience established if not implemented. Thus the Court finds that the alleged disobedience on the part of the 2<sup>nd</sup> interested party will collapse. While making that finding, the Court also finds that the respondent was misconceived in stating and submitting that the deletion as recommended in the award was a precondition to whether the respondent would recognize the claimant union and sign the relevant recognition agreement.

4) As submitted for the claimant, under the transitional section 32 of the Employment and Labour Relations Court Act, 2011 any regulation or other instrument made or issued under the Labour Institutions Act, 2007 continued to have effect as if such regulation or other instrument were made or issued under the Act. Further section 22 of the 6<sup>th</sup> schedule to the Constitution of Kenya 2010 provides that all judicial proceedings pending before any court shall continue to be heard and shall be determined by the same court or a corresponding court established under the Constitution as directed by the Chief Justice or the Registrar of the High Court. The Court being the corresponding court to the former Industrial Court took over all the cases that were pending before that former Court and the Court finds as unfounded and unjustified submission as made for the Respondent to challenge the decree on account that it was signed by the Deputy Registrar of the Court. The Court finds that the decree was validly and lawfully issued by the Deputy Registrar.

5) Parties have referred to **Kenya Hotels and Allied Workers Union –Versus- The Honourable Attorney General and 6 others Petition ELRC 5 of 2013 at Nairobi** where Nduma J, Onyango J and Ndolo J heard the matter. In relation to the award herein in issue, the Court in that petition found that it would not order the Registrar of Trade Unions to strike out the words as recommended in the award from the 2<sup>nd</sup> interested party's constitution because doing so would amount to infringing on the freedom of association of the 2<sup>nd</sup> interested party herein. On that account, the Court once again returns that the claimant has failed to establish the 2<sup>nd</sup> respondent's violation of the order by way of a recommendation in the award and subsequent decree flowing from the award. In that petition the petitioner (the claimant or applicant herein) had applied for an order compelling the 1<sup>st</sup> respondent herein (the 2<sup>nd</sup> respondent therein) to sign a recognition agreement and negotiate a CBA with the claimant but which was declined because it had been overtaken by events because the employees were already enjoying benefits of the CBA as concluded with KUDHEIHA. The respondent herein was not a party in the petition and the judgment on the petition did not affect the orders in the award and decree herein that the claimant and respondent conclude a CBA in 3 months. Thus the Court finds that it was misconceived for the respondent to urge and submit that the award, decree and the application had been overtaken by events by reason of the judgment in the petition.

6) Has the respondent disobeyed the order in the award and the decree that the parties conclude a recognition agreement in 3 months? First the award was given on 08.04.2008 and the decree issued on 25. 10. 2015 and served on 03.02.2017. The three months to conclude the award were lapsing on or about 08.04.2008. Thus the decree was issued and served long after the lapsing of the 3 months stipulated in the order. The Court has revisited the supporting affidavit and all material in support of the application and nowhere does the claimant alleged or urge that the award was served prior to lapsing of the 3 months and obviously the decree was issued long after the 3 months had lapsed. In the circumstances the Court returns that the claimant was guilty of irreparable, inexcusable and unexplained inordinate delay in seeking to have the order in the award complied with and then enforced accordingly. The evidence is that the claimant did nothing, after the award, to have the terms of the order obeyed and implemented accordingly. The Court shall not aid the indolent and to that extent, the terms of the order were overtaken by effluxion of time. Accordingly, the claimant has failed to establish contempt on the part of the respondent as was alleged, claimed and prayed for. The application will therefore fail.

7) The court has considered the long history of the case, the parties' submissions as contributing to the final findings, and the complexity of the legal and factual issues involved and considers that each party shall bear own costs of the application.

In conclusion, the application filed herein on 27.05.2019 is hereby dismissed with orders that each party to bear own costs of the application.

**Signed, dated and delivered in court at Nairobi this Friday, 3<sup>rd</sup> July, 2020.**

**BYRAM ONGAYA**

**JUDGE**