



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 765 OF 2018

KENYA HOTELS AND ALLIED WORKERS UNION.....CLAIMANT

VERSUS

TOURISM PROMOTION SERVICES (MANAGEMENT) LIMITED

T/A SERENA LODGES AND HOTELS.....RESPONDENT

KENYA UNION OF DOMESTIC,

HOTELS, EDUCATIONAL INSTITUTIONS

AND HOTEL HOSPITAL WORKERS.....1ST INTERESTED PARTY

KENYA HOTEL KEEPERS

AND CATERERS ASSOCIATION.....2ND INTERESTED PARTY

JUDGMENT

1. The Claimant is a trade union duly registered under the provisions of section 19 of the Labour Relations Act, 2007 and has the mandate to represent employees in the hotel industry.
2. The Respondent is a duly registered company carrying on business in the hotel industry.
3. The 1st Interested Party is a trade union registered to represent employees in the domestic, hospitals, hotels and educational institution sectors.
4. The 2nd Interested Party is an association duly registered to represent the interests of employers who carry on the business of hotels, camps and lodges in Kenya.
5. On 21.5.2018, the claimant brought this suit alleging that she had recruited 853 out of 1100 unionisable employees of the respondent as her members but the respondent had refused to sign a Recognition Agreement in her favour, for purposes of collective bargaining. She further averred that the respondent had subjected her members, who had resigned from the 1st Interested Party, to unprocedural deduction of agency fees in favour of the rival union contrary to section 49 of the Labour Relations Act. Consequently, the Claimant seeks the following reliefs—
 - a. That the Honourable Court be pleased to find the Respondents' defiance to sign a recognition agreement an unfair labour practice.
 - b. That the Honourable Court be pleased to compel the Respondent to sign a recognition agreement within 21 days.
 - c. That the Honourable Court be pleased to find the union dues deduction in favour of KUDHEIHA unfair and against the Claimant's members constitutional rights.
 - d. That the Honourable Court be pleased to find that the agency fee deduction from the Claimant members by the Respondent unfair.
 - e. That the Honourable Court be pleased to order the Respondent to stop further deduction of agency fee and union dues in favour of KUDHEIHA.

f. That the Honourable Court be pleased to order the Respondent to refund agency fee to the aggrieved Claimant members.

g. That, the cost of this suit be paid by the Respondent.

6. The Respondent opposed the claim vide the Statement of Response filed on 6.12.2019. The 1st Interested Party responded through the Replying Affidavit of Albert Njeru sworn on 12.6.2018 while the 2nd Interested Party responded vide her Memorandum of Response filed on 23.7.2020. In brief the above three parties averred that the suit is *res judicata* and lacks merits, and it should be dismissed costs.

7. The suit was disposed of by written submissions on the strength the materials on record.

The Claimant's Case

8. The Claimant's case is that she successfully recruited into her membership more than a simple majority of the respondent's unionisable staff required for recognition under section 54 (1) of the Labour Relations Act 2007 but the Respondent has refused to sign a recognition agreement in her favour; that the Respondent's refusal to sign a recognition for purposes of collective bargaining is a violation of section 4 of the Act, Articles 36 and 41 of the Constitution and as such, she is guilty of labour malpractice.

9. The Claimant urged this Court to exercise its jurisdiction as envisaged in the section 5 of the Labour Relations Act as read together with Article 23 of the Constitution, or else her rights under Articles 36 and 41 of the Constitution will be prejudiced. She referred to several persuasive decisions of this court, its predecessor and the High Court in which she has successfully battled for recognition from various members of the 2nd interested party. In **Cause 36 of 2005 KHAWU v Kericho Tea Hotel** the defunct Industrial Court ordered the respondent personally or through Association of Hotel Keepers and Caterers to accord the claimant recognition. The court further ordered KUDHEIHA to amend its constitution by deleting the provision which gave the mandate to represent workers in hotel, restaurants, casinos, catering and similar establishments providing tourism services.

10. In **Cause 39 of 2007 KHAWU V Grand Regency Hotel** the Industrial Court held that KUDHEIHA was no longer the appropriate, relevant and representative union in the hotel industry and went on to order KUDHEIHA to completely vacate the hotel industry upon expiry of the existing CBAs she had entered into individually or collectively. The court also barred KUDHEIHA from entering into any new CBAs in the industry.

11. Referring to the said decisions by the defunct Industrial Court, the claimant, submitted that the import of section 22 of the sixth Schedule to the Constitution and the holding on **National Union of Water and Sewerage Employees & Others Vs Nairobi Water and Sewerage Company Limited & Others; Civil Appeal 18 of 2013**, is that no powers were donated to the corresponding court to *suo moto* recall, review and set aside orders and/or vary decisions of its predecessors.

12. In **Petition 405 of 2009 Norfolk Hotel v Industrial Court [2012] eKLR** Mumbi Ngugi J held that employer's right to association cannot extend to protection of benefits such as recognition or collective agreements entered by the employer's association so as to deny employees the right to belong to a trade union other than the one with which the employers' organization has entered into agreement. The court went on to say that holding otherwise would mean infringing on the employee's right to form, participate in the activities and programs of a trade union, because the employees would be compelled to join or remain in a particular trade union against their will. Finally, the court found no basis for a complaint on alleged infringement of constitutional rights because the Industrial Court which was mandated to determine a dispute had done so in accordance with the law.

13. In **Cause 376 of 2015 KHAWU v The Sun Hotel**, Radido J held that KUDHEIHA has no business purporting to represent unionisable employees within the hotel industry and in particular the employees of the respondent. The court went on to order the respondent to sign a recognition agreement with KHAWU. The Judge reiterated the same holding in **KHAWU v Great Rift Valley Lodge & Golf Resort [2014] eKLR** where the same parties and the dispute was involved.

14. In this case, the claimant urged this court to order the respondent to sign recognition agreement in her favour because she has recruited as members of more than simple majority from the respondent's unionisable staff. She further urged the court to deem the CBAs between the 1st and 2nd interested parties as invalid because they were negotiated in contempt of court as pointed out above.

15. The Claimant further submitted that the Respondent has made union dues deductions from her members, in favour of 1st Interested party despite them renouncing their union membership from that union. Additionally, the Claimant avers that the Respondent has subjected her members to unprocedural agency fees deduction and in total disregard of section 49 of the Labour Relations Act 2007. She relied on **Rift Valley Railways Workers Union v Rift Valley Railways (Kenya) Limited & another [2014] eKLR** where Ndolo J held that the agency fees should only be charged on employees who do not belong to any trade union at all but are benefiting from a CBA. The Judge went on to hold that the agency fees should not be levied on employees who resign from a trade union to join another.

16. In view of the foregoing, the claimant argued that levying agency fees violated freedom of association as guaranteed under Article 36 and 41 of the Constitution because it was tactic of forcing dissenting employees to finance and support ideologies and programs they do not believe in. therefore, she prayed for the orders sought in her Statement of Claim.

The Respondent's Case

17. The Respondent's case is that she is a member of the 2nd interested party which is an association of employers in the hotel and hospitality industry. She contended that the 2nd interested party is the link between her members and the various trade unions for purposes of negotiating CBAs. Again she argued that the issues raised in the Memorandum of Claim are *res judicata* and as such the suit should be dismissed.

18. As regards the issue of recognition, the respondent contended that there has been an existing recognition agreement between 1st and 2nd Interested Parties hence she cannot sign another recognition agreement with the claimant. She further contended that the said interested parties have also concluded and registered a CBA dated 11.1.2017 (RCA No.1 of 2017) which binds her as a member of the 2nd interested party. In addition, she argued that the Claimant has not met the simple majority of 50+1% of all unionisable employees within the 2nd interested party's members as required by section 54 of the Labour Relations Act to dislodge the 1st interested party.

19. The respondent relied on the majority decision in **ELRC Petition No.5 of 2013, KHAWU v Attorney General & 6 others [2015] eKLR** where the court held that it could order recognition because the claimant did not prove that she recruited 50 + 1% of the members of the employers' association or a simple majority of the employees of the employers' association. She further relied on **KHAWU V Hilton Hotel Nairobi Cause 1194 of 2014** where the court held that the claimant can only dislodge KUDHEIHA by recruiting a simple majority of the employees within the members of the employers' association and seek recognition from the Association and not the individual employer.

20. The respondent maintained that the Kenya Association of Hotel Keepers and Caterers (2nd interested party) is the appropriate party to address the issue of recognition of the claimant. She contended that since she is a member of the association, the applicable law is section 54 (2) of the Labour Relations Act and as such the simple majority threshold applicable in this case should relate to the employees within the group of employers in the Association and not just her.

21. As regards the issue of agency fees, the Respondent denied violating her employee's freedom of association and fair labour practices by deducting and remitting agency fees from the claimant's members because they are benefiting from the CBA negotiated by the 1st interested party. She further argued that the claimant recruited members from her employees who thereafter wrote letters communicating their withdrawal from the 1st interested party. She contended that the said employees are free under Article 41 (5) of the Constitution to join a trade union of their choice provided they pay agency fees to union which has concluded a CBA.

22. In view of the foregoing, she submitted that deducting agency fees in favour of the 1st Interested Party from the claimant's members was unlawful and contended that she is bound to do so by the CBA between the interested parties herein and by dint of section 49 of the Labour Relations Act. For emphasis, the Respondent relied on the majority decision in **ELRC Petition No.5 of 2013, KHAWU v Attorney General & 6 others [2015] eKLR** where the court held that it would not be fair for a union to negotiate for free riders. The court went to hold that agency fee does not interfere with the freedom of association since the fee is intended to meet the cost of negotiating the CBA and not financing activities of the union.

23. She further relied on **Tailors and Textile Workers Union v Ashton Apparel (EPZ) Limited [2015] eKLR** where Rika J held that under section 48(6) of the Labour Relations Act, union dues (membership subscription) are not to be levied on an employee who has resigned from a union, but such an employee becomes liable to pay agency fees.

24. Finally, the respondent urged this Court to dismiss the claim with costs because the claimant has not met the threshold for recognition under section 54 of the Act and also because she did not prove that payment of agency fee by her members to a rival union is unlawful and a unconstitutional.

The 1st Interested Party's Case

25. The 1st Interested Party averred that she is a duly registered trade union with the requisite membership as per rule 3 of her registered Constitution. She contended that the Respondent is a member of the 2nd Interested Party with whom she has a subsisting recognition agreement and a CBA. She further contended that the claimant has not recruited a simple majority of the unionisable employee of the 2nd interested party as required by the law. She further contended that the alleged letters of withdrawal of membership do not comply with section 48 of the Labour Relations Act because they are addressed to her General Secretary as opposed to the employer.

26. She averred that the Claimant filed **Petition 5 of 2013 (formerly Petition 1964 of 2011)** and **Industrial Cause 1964 of 2011**, seeking the same orders as those sought in the Notice of Motion Application dated 21st May 2018, but the suits were dismissed. She contended that the claimant further filed **cause 1394 of 2014** against Hilton Hotel Nairobi, who is also a member of the 2nd Interested Party, seeking recognition by the individual employer and again the suit was dismissed.

27. She further submitted that the decisions in Cause 36 of 2005, cause 39 of 2007, cause 67 of 2007 and Petition 405 of 2009 relied upon by the claimant in her submissions, were the subject of Petition 5 of 2015, where the majority decision settled the dispute in favour of the interested parties herein. Consequently, the claimant argued that the instant suit is *res judicata* and the only recourse for the claimant is an appeal against the said majority decision.

28. She further submitted that the claimant sought and obtained similar orders to the ones sought in the instant suit in **Cause 377 of 2016**, against the 1st Interested Party and the Great Rift Valley Golf Resort/Green Park and Country Complex but the judgment was stayed immediately by the Court of Appeal in **Civil Application No.21 of 2017**.

29. She urged this court to follow the majority decision in Petition No.5 of 2015 and its decision in **cause No.380 of 2013, KHAWU v Pangoni Beach Resort [2015] eKLR** where the court upheld the employer's right to remain in an employers' association and not to be forced to cease membership because a simple majority of her employees have exercised their freedom of leaving the union which is recognized by the employer's Association.

The 2nd Interested Party's Case

30. The 2nd Interested Party basically echoed the submissions by the respondent and the 1st interested party. She maintained that the Claimant is yet to attain the recruitment of a simple majority of its members or their employees, thus not in a position to negotiate or sign a recognition agreement with her. She further contended that the Respondent being a member of her Association, has a recognition with the 1st Interested Party, hence signing a fresh recognition agreement with the Claimant would be unlawful since it would amount to undermining her authority and mandate.

31. As regards the issue of agency fees, the 2nd interested party submitted that the levy on the claimant's members after they ditched the 1st interested party was lawful and cannot be refunded. She argued that the levy was provided for in the CBA and sanctioned by an order of the Labour Minister through Kenya gazette.

32. She further submitted that the claimant had previously sought similar orders in several suits without success and as such the court should likewise decline the reliefs sought herein because the suit is *res judicata*. She also urged the court to reject the Conciliation report because the Conciliator exceeded her mandate by dealing with the issue of recognition while the reference was on the issue of agency fees only.

33. Finally, the 2nd interested party denied that the freedom of association of the claimant's members was violated by the failure to accord recognition and by the deduction of the agency fees from their salaries, and consequently, prayed for the suit to be dismissed with costs.

The Claimant's Rejoinder

34. The Claimant filed a rejoinder to the 1st Interested Party's Affidavit contending that the recognition agreement between the interested parties was in violation of judicial authority, contemptuous and a mockery of the existing valid orders of this Court and its predecessors which had invalidated it. She contended that the interested parties have no valid recognition agreement and they have not shown that the 1st interested party enjoys simple majority representation of the unionisable workforce within the 2nd interested party's members. Therefore, she argued that the decisions made in **Petition 5 of 2013** and **Cause 1394 of 2014** should not be used to shield blatant disobedience of judicial authority. She urged that the continued unprocedural deduction of agency fee to benefit the 1st Interested Party is unlawful and should be stopped and the money refunded as recommended by the Conciliator.

Issues for determination and analysis

35. After careful consideration of the pleadings, the evidence and the submissions by the parties, the issues for determination are—

(a) *Whether the suit is res judicata.*

(b) *Whether this Court should disregard the Conciliator's report.*

(c) *Whether the Claimant has attained the threshold for recognition for purposes of collective bargaining.*

(d) *Whether the Respondent has violated freedom of association for the Claimant's members through unlawful levying of agency fees.*

(e) *Whether the Claimant is entitled to the reliefs sought.*

Whether the suit herein is *res judicata*.

36. The respondent and the interested parties contended that the suit herein is *res judicata* because it involves issues which have already been determined between the parties herein by several courts of competent jurisdiction. The said issues which have fully been determined by competent courts include: -

(a) whether individual members of the 2nd interest party can be compelled to accord recognition to the claimant when the said employers' association has recognition agreement and CBA with the 1st interested party,

(b) Whether levying of agency fees from the claimant's members after withdrawal from the 1st interested party is unlawful and an affront to the freedom of association for concerned employees.

37. **ELRC Petition No.5 of 2013, KHAWU v Attorney General & 6 others [2015] eKLR** was presided over by three Judges and all the parties herein were also parties in the said matter. After hearing the parties, the court framed the following issues for determination: -

(a) ***Jurisdiction of High Court to hear judicial review and petitions challenging decisions of the Industrial Court (now Employment and Labour Relations Court)***

(b) ***Whether deductions of agency fees and service charge violate Article 40 and 41 of the Constitution.***

(c) ***Whether the claimant is entitled to the declarations and orders sought in the Statement of Claim.***

38. On the issue of agency fees, the court by a majority decision found that it was a lawful charge which did not violate any rights or freedoms guaranteed to employees under the constitution. The court stated that:

“Section 48 and 49 are not mutually exclusive. One is for payment of union dues by members of a trade union and the other for payment of agency fees by non-members benefiting from a union CBA. The law does not suggest that the two cannot be charged at the same time. Article 41 does not suggest that freedom of association should be free of charge nor does it suggest that payment of agency fee is interference with freedom of association. Agency fees does not limit the right to freedom of association. It is a charge for a benefit. On the contrary, section 49 coming immediately after section 48 in the Act appears to have anticipated a situation where an employee can benefit from a CBA of one union and be a member of a different union. The Act therefore provided for union dues for the latter and agency fees for the former, thus ensuring that both unions are fairly and adequately catered for, while at the same time an employee is free to join a union of his choice and while benefiting from terms of a collective agreement negotiated by a union which he does not wish to become a member.

We find that neither Article 40 nor 41 are infringed by section 49 of the Act. It is our opinion that it is perfectly in order and there is nothing unconstitutional about a union charging a levy on non-members who benefit from its negotiated CBA.”

39. As regards the second issue, the court declined to grant the prayer for recognition on ground that the claimant did not prove that she had recruited simple majority of the employees within the members of the employers’ association. The court stated that: -

“For the Claimant to qualify for recognition by the 2nd Respondent, it must prove that it has achieved a simple majority of either 50% of the 2nd Respondent’s member organizations or of the employees of the 2nd Respondent’s members. The court cannot hand the claimant recognition without it proving that it has achieved a simple majority as this would contravene both Article 41 of the Constitution and section 54 of the Act”

40. With respect to the claim for refund of the agency fee collected, the court dismissed same and held that the order had been sought in previous suits including Cause No. 163(N) of 2009 and it was declined.

41. The same parties further litigated over the same issues in **KHAWU V Hilton Hotel Nairobi Cause 1194 of 2014** where the court held that: -

“For that reason, the claimant union to dislodge KUDHEIHA from being the sole union to negotiate terms and conditions of employment of the employees of Hotels who are members of the Association, it has to recruit a simple majority of employees of the Hotels who are members of the Association and not simple majority in one hotel only.”

42. Again the same unions and the employers’ Association litigated in **KHAWU v Pangoni Beach Resort [2015] e KLR** where the court declined to grant similar orders as the one sought herein. There is no evidence that the claimant appealed against the said decisions in the above matters, but it is clear that she has decided to persist in filing similar suits against different members of the 2nd interested party herein. The matters have been conciliated and thereafter litigated before different Conciliators and judges yielding to conflicting decisions.

43. In **KHAWU v Great Rift Valley Lodge & Golf Resort [2014] eKLR** the same parties litigated before Radido J who disagreed with the Majority decision in **ELRC Petition No.5 of 2013, KHAWU v Attorney General & 6 others [2015] eKLR, supra**, and held that the claimant had the right to be accorded recognition by the respondent individually notwithstanding her membership to employers’ association. However, the respondent appealed and the Court of Appeal stayed the decision pending hearing of the appeal after being satisfied that there are conflicting decisions from this court. The status of the said appeal has however, not been brought to the court’s attention.

44. Having highlighted the foregoing matters, it is very clear that the issues for determination in the instant suit are neither new nor without a determination from courts. The issues have fully been determined by courts of concurrent jurisdiction and an appeal has been preferred against the decision in one of the matters. In my considered view, repeating litigation over the same issues when there are already conflicting decisions will never end the dispute between the parties. Therefore, I must agree with the respondent and the interested parties that the issues before me is *res judicata* since they have been fully determined by courts of competent jurisdiction. Litigations over a particular matter must come to an end at some point, and in the instant dispute, the time is now.

45. In view of the foregoing, I opine that the best cause for the parties to take now is to pursue the appeal against the decision by Radido J in **KHAWU v Great Rift Valley Lodge & Golf Resort [2014] eKLR** and any other which may be pending, so that the Court of Appeal can make a decision to settle the matter once and for all. According to me, the dispute between the players in all the said suits turns on the issue whether the employers and employees are equal before the law or whether they enjoy equal freedom of association under Article 36 and 41 of the Constitution read with section 4 and 6 of the Labour Relations Act. Unless that issue is determined, the parties will continue in the endless competition over who is more entitled to freedom of association than the other and all will be citing the same provisions of the Constitution and the Labour Relations Act.

Recognition, and refund of agency fees.

46. Having found that the suit herein is *res judicata*, I decline to determine the issue of recognition and refund of agency fees afresh. For the same reason, I also decline to adopt the Conciliation report dated 30.9.2019. In the end I dismiss the suit with no order as to costs.

Dated and delivered at Nairobi this 8th day of October, 2020.

ONESMUS N MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE