



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 1986 OF 2015

CONSOLIDATED WITH CAUSE NO 1081 OF 2015

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

VERSUS

THE PANARI HOTEL.....1ST RESPONDENT

THE JACARANDA HOTEL.....2ND RESPONDENT

THE SUNSET HOTEL.....3RD RESPONDENT

SOUTHERN SUN HOTEL.....4TH RESPONDENT

SIANA SPRINGS HOTEL.....5TH RESPONDENT

THE FAIRMONT GROUP OF HOTELS.....6TH RESPONDENT

SERENA GROUP OF HOTELS.....7TH RESPONDENT

THE SAFARI PARK HOTEL.....8TH RESPONDENT

THE BOMA HOTEL.....9TH RESPONDENT

SUNA AFRICA HOTEL.....10TH RESPONDENT

NAIROBI HILTON HOTEL.....11TH RESPONDENT

AND

KUDHEIHA WORKERS.....1ST INTERESTED PARTY

KENYA HOTEL KEEPERS AND

CATERERS ASSOCIATION.....2ND INTERESTED PARTY

JUDGMENT

Introduction

1. This judgment relates to cause number 1986 of 2015 as consolidated with cause number 1986 of 2015. Pursuant to consent of the parties, the matter proceeded by way of written submissions.
2. The issue in dispute has to do with the levying of Value Added Tax (VAT) on account of service charge paid to the Claimant's members.

The Claimant's Case

3. The dispute in this case arises from interpretation of provisions in the Value Added Tax Act, 2013 which provide for levying of 16% VAT on supply of services. The Claimant contends that the Respondents have misconstrued these provisions with the effect that service charge paid to the Claimant's members have been subjected to both VAT at 16% and Pay as You Earn (PAYE) at 30%. The result is that the members' tax bracket has been elevated and the tax burden has climbed to 46% as compared to 30% borne by employees in other sectors.

4. The 1st Interested Party, KUDHEIHA Workers shares these grievances with the Claimant.

5. The Claimant seeks the following reliefs:

- a. A declaration that the deduction of 16% VAT from service charge payable to its members is unfair;
- b. An order restraining the Respondents from deducting 16% from the service charge payable to the Claimants' members;
- c. Costs of the suit.

The Respondents' Case

6. The 5th Respondent, Siana Springs Hotel filed a Reply on 16th February 2016 stating that the Value Added Tax Act (No 35 of 2013) had effectively repealed the Value Added Tax Act (Chapter 476). One of the changes in the new VAT Act was the insertion of Section 13(7) which introduced a variable rate of 16% on supply of accommodation and restaurant services.

7. The Claimant challenged the constitutionality of the new provisions in ***KUDHEIHA Workers Union v Kenya Revenue Authority and 2 Others (Petition No 544 of 2013)***. In that petition, the Judge while sympathising with the Petitioner affirmed the constitutionality of the provisions and referred the matter to the Executive and Legislature.

8. Dissatisfied with the Judge's decision, the Petitioner sought the intervention of the National Assembly Departmental Committee on Finance, Planning and Trade which tabled a report dated 3rd April 2014. In its report, the Departmental Committee found no justification for an amendment to the Value Added Tax Act, 2013.

9. The 5th Respondent takes the view that the issues raised in this claim were canvassed in Petition No 544 of 2013 and are therefore *res judicata*.

10. The Federation of Kenya Employers (FKE) filed a Memorandum of Defence on behalf of the 11th Respondent, Nairobi Hilton Hotel, stating that the Hotel does not charge 16% VAT on the service charge due to the employees.

Determination

11. At the close of the pleadings the issues for determination in this case were framed as follows:

- a. In light of Sections 13(3)(c) and 5(4) of the VAT Act, 2013 who bears the burden of paying 16% VAT on service charge?
- b. If it turns out that the Respondents have erroneously recovered VAT on service charge are the Claimant's members entitled to refund of the amounts recovered erroneously?

12. Before dealing with the substantive issues I need to state that what is in issue is not the constitutionality of the provisions of the VAT Act, 2013 which was the subject of Petition No 533 of 2013. What is now before the Court is the interpretation assigned by the parties to these provisions. That would rest the issue of *res judicata* raised by the 5th Respondent.

13. The central provisions in this case are Sections 5(4) and 13(3) of the VAT Act. Section 5(4) provides as follows:

(4) The amount of tax payable on a taxable supply, if any, shall be recoverable by the registered person from the receiver of the supply, in addition to the consideration.

14. While Section 13(3) provides:

(3) Subject to subsections (4) to (6), the consideration for a supply, including a supply of imported services, shall be the total of-

- a. the amount in money paid or payable, directly or indirectly, by any person, for the supply; or***
- b. the open market value at the time of the supply of an amount in kind, paid or payable, directly or indirectly, by any person for the supply; and***
- c. any taxes, duties, levies, fees and charges (other than value added tax) paid or payable on, or by reason of the supply, Reduced by any discounts or rebates allowed and accounted for at the time of the supply.***

15. It seems to me that under Section 13(3)(c) of the VAT Act, 2013, taxable value of supply includes the value of service charge. Further, under Section 5(4) of the Act, an employer in the service industry is under an obligation to recover VAT on account of the entire amount paid by the employer's customers. This would include service charge.

16. I think these provisions are clear and as held by the Court of Appeal in ***Sony Holdings Ltd v Registrar of Trade Marks & Another [2015] eKLR*** where words in a statute are precise and unambiguous, the natural and ordinary meaning should be applied. The natural and ordinary meaning in this case is that VAT on service charge is a valid charge to an employer's customers and the employer is the recovery agent on behalf of the Kenya Revenue Authority.

17. The Court was therefore unable to understand under what circumstances an employer would recover VAT from its employees.

18. Consequently, the Court finds the Respondents' action of recovering VAT from its employees not only unlawful but also unreasonable and directs that any such charges must stop forthwith.

19. I however withhold my decision on the prayer for recovery of past charges pending filing of particulars by the aggrieved employees.

20. I direct that each party will bear its own costs.

21. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 27TH DAY OF
JANUARY 2017**

LINNET NDOLO

JUDGE

Appearance:

Mr. Simiyu (Union Representative) for the Claimant

Mr. Mugambi for the 5th Respondent

Miss Oyombe for the 11th Respondent

Mr. Tonge Yoya (Union Representative) for the 1st Interested Party

Mr. Ongoto for the 2nd Interested Party