



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 75 OF 2015

(BEFORE HON. LADY JUSTICE MAUREEN ONYANGO)

KENYA HOTEL AND ALLIED WORKERS UNION ...CLAIMANT

-VERSUS-

SUNSET HOTEL LIMITEDRESPONDENT

J U D G E M E N T

Kenya Hotels and Allied Workers Union is a Trade Union registered under the Labour Relations Act and mandated by its constitution to represent employees working in Hotels, Restaurants, Casinos, Catering and similar establishments providing lodging, food, beverages and related establishments.

The Respondent is a limited liability company limited carrying out hotel business within Kisumu City in Kisumu County.

It is the contention of the Claimant that it is mandated to represent workers of the Respondent and that it has a valid recognition agreement with the Respondent signed on 21st January 2011. The issue in dispute is that the Respondent has refused to negotiate a Collective Bargaining Agreement with the Claimant. It is the Claimant's case that following the refusal of the Respondent to negotiate the Collective Agreement it invoked the provisions of section 62 of the Labour Relations Act and reported a trade dispute to the Minister for Labour. The Minister accepted the dispute and appointed Ms. Hellen Maneno of Kisumu Labour Office as conciliator. It is the claimant's case that the standoff between the Union and the Respondent culminated in several suits filed in court which have been withdrawn in favour of this suit. These are Cause No.999 of 2011, Cause No.201 of 2013 and Cause No.36 of 2015.

It is the Claimant's case that it recruited employees of the respondent first in June 2010 who withdrew after being coerced by the respondent in mid 2011. The Claimant made the second recruitment on 15th December 2014 and successfully recruited 46 out of 60 unionisable employees. The Claimant served the respondent with the check-off forms on 2nd January 2015 which have never been acted upon by the respondent despite the mandatory provisions of law authorizing the deductions. The Claimant alleges that the respondent has also refused to negotiate Collective Bargaining Agreement.

The Claimant avers that on 21st January 2011 matters of Recognition Agreement between the parties were amicably resolved before the Ministry of Labour conciliator in a trade dispute reference ML/IR/56/5/2010 and the same was signed by the parties.

It is the Claimant's case that on 9th March 2011 after prior unsuccessful attempts to negotiate Collective Bargaining agreement with the Respondent it reported a trade dispute to the Ministry of Labour. The parties failed to agree while the Respondent resorted to intimidation and successfully coerced the

claimant's members to withdraw from its membership, a matter that was referred to court.

The claimants avers that it re-recruitment members again in December 2014 but the Respondent adamantly maintained her refusal to negotiate any Collective Bargaining Agreement.

The claimant submits that it has a valid Recognition Agreement with the Respondent within the provisions of Section 54(1) of the Labour Relations Act 2007 a copy of which it has annexed to the memorandum claim. It submits that the purpose of signing a Recognition Agreement is to pave way for conducive negotiation of Collective Bargaining Agreement, that the Respondent has no option but respect the law to negotiate Collective Bargaining Agreement or be bound by terms and conditions that this honourable court shall determine because she has not revoked the same recognition as envisaged at section 54 (5) of the Labour Relations Act 2007.

The claimant further submits that her members rights of Association have been infringed by the Respondent. That Article 36 read together with article 41 of the Constitution of Kenya 2010 dictates the right and freedom to choose, join and participate in programmes of a trade union. That this right is protected by both Article 23 the Constitution and section 5 of the labour relations act 2007. It submits that the Respondent's refusal to deduct union dues and denial of a valid recognition Agreement frustrates the rights and freedoms of the claimant and her members and amounts to unfair labour practice contrary to Article 41(1) of the Constitution. The Claimant relied on **Petition No.405 of 2009 between the Claimant and Fairmont the Norfolk** where Mumbi Ngugi J. confirms that the constitutional rights of the Respondent shall not be prejudiced and instead it is the Claimant and here members' constitutional rights of Association that shall suffer irreparable damage.

Respondent's Case

The Respondent filed a Response to the Claim in which it contends that there is no valid collective bargaining agreement between the parties as Anexure C3 displayed by the Claimant to the Memorandum of Claim is not witnessed and is the subject of Industrial Court Cause 999 of 2011 where no determination was made on the said document that is contested by the Respondent.

The Respondent further states that it is a member of Kenya Association of Hotel Keepers and Caterers which negotiates on its behalf. The Respondent states that Cause Nos. 999 of 2011, 201 of 2013 and 36 of 2015 have not been withdrawn as alleged by the Claimant and are pending for determination.

The Respondent contends that it has 60 unionisable employees who have oscillated between membership of the Claimant and **Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA)** as confirmed in a court ruling delivered on 31st January, 2012 in Cause No.999 of 2011.

The Respondent further contends that the Claimant's members in its employment do not meet the threshold of a simple majority of unionisable employees. The Respondent argues that the Claimant not being the sole representative of employees in the Hotel Industry, the workers have a right to join a trade union of their choice as provided under Article 41 of the Constitution. The Respondent further argues that it also has a right to join an employer's organisation as enshrined in Article 41(3) (e) and (f) of the Constitution. It prays that the Claim be dismissed with costs.

Determination

It is not in dispute that the Claimant has been recruiting employees of the Respondent and that the employees have oscillated between membership of the claimant on the one hand and Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA) Workers. It is also not in dispute that the relationship between the Claimant and the Respondent has been the subject of several disputes in this court notable Cause No.999 of 2011, Cause No.201 of 2013 and Cause No.36 of 2015. The Claimant has stated that all these suits between the parties which are related to the issue under dispute, that is, recognition, have been withdrawn in favour of this dispute, a fact denied by the

Respondent. No proof has been submitted by either party to confirm their respective contentions.

It is however apparent from the ruling delivered by Kosgei J. in cause No.999 of 2011 on 31st January, 2012 that there was no recognition agreement signed by the parties on 21st January, 2011 upon which the claimant has relied to file the present dispute in which it seeks prayers that the court determines the new terms and conditions of service of Sunset Hotel's unionisable employees by adopting and/or amending the claimant's proposals for the period January 2013 to January 2017.

In the ruling Kosgei J. observed as follows:-

The respondent has disowned the recognition agreement purportedly signed with the claimant as a forgery and only a full hearing of the claim will determine the validity of the allegation. In the circumstances we are unable to make any findings based on the same document. They are enjoying the benefits of the Collective Bargaining Agreement negotiated by KUDHEIHA Workers and the said Association and it is fair and lawful for KUDHEIHA to receive union dues from its members and agency fees from non-union members who benefit from the same Collective Bargaining Agreement. It is the employees' democratic right to choose which of the two unions in the industry to associate with. There is no evidence that the respondent coerced them to join KUDHEIHA Workers.

That ruling was not contested by the Claimant and the position therein in so far as the alleged recognition agreement is concerned remains valid to date. The Claimant in the submissions filed herein has stated that cause No.999 of 2011 was withdrawn in favour of this case. I have already stated above that there is no evidence of withdrawal of the case. The Claimant has not submitted any further evidence to show that there was confirmation of validity of the said recognition agreement elsewhere.

The only conclusion I can draw from the foregoing is that there is no valid recognition agreement between the Claimant and the Respondent. The submissions by the Claimant herein that the matters of the recognition agreement were amicably resolved on 21st January, 2011 before the Ministry of Labour in trade dispute Reference No.ML/IR/56/5/10 is the direct opposite of the ruling of the court in cause No.999 of 2011 in relation to the said recognition agreement.

Conclusion

I find that there is no valid recognition agreement signed between the Claimant and the Respondent. A trade Union can only negotiate a collective bargaining agreement after signing a recognition agreement as provided in section 54 of the Labour Relations Act. The Claimant therefore has no capacity to negotiate a Collective Bargaining Agreement with the Respondent in the absence of a valid recognition agreement.

For the foregoing reasons, the claim is dismissed with no orders for costs.

DATED, SIGNED AND DELIVERED THIS 26TH DAY OF JANUARY, 2017

MAUREEN ONYANGO

JUDGE