



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**CAUSE NO. 322 OF 2016**

**KENYA HOTELS & ALLIED WORKERS UNION                      CLAIMANT**

**v**

**ENASHIPAI RESORT & SPA    RESPONDENT**

**RULING**

1. In a judgment delivered on 1 December 2016, the Court ordered Enashipai Resort & Spa (Respondent) to grant recognition to the Kenya Hotels & Allied Workers Union (Claimant Union) within 30 days.
2. The Cause had proceeded as an undefended Cause.
3. On 11 January 2017, the firm of L. Kimondo acting for the Respondent filed a Notice of Appointment of Advocates and a motion seeking

1. ....

2. That there be a stay of execution of the judgment delivered by the court on 01/12/26 and all its consequential orders pending the hearing and determination of this application.

3. That the ex parte proceeding and judgment dated 01/12/16 delivered by this honourable court be set aside,

4. That the Respondent/Applicant be granted leave to respond to and defend this cause in terms of the draft response,

5. That the attached draft response be deemed as duly filed and served upon the Claimant,

6. That costs be in the course.

4. When the motion was placed before Court, the Court directed that it be served for *inter partes* hearing on 21 February 2017.

5. Barely a fortnight later, the Union filed a motion under certificate of urgency seeking

1. ...

2. That, the chairman who is also the current Managing Director of the Respondent Mr. James

Mwangi be ordered to appear in person during the hearing of this Application to show cause why section 13 of the Employment and Labour Relations Court Act cap 234B cannot be enforced against him.

3. That, the Honourable Court be pleased to issue execution order and/or warrant of arrest against the Chairman/Managing Director Mr. James Mwangi of the respondent herein.

4. That, the Honourable Court be pleased to execute her own orders as per section 13 of the Employment and Labour Relations Court Act, cap 234B laws of Kenya.

6. The Court directed that this application by the Union be served for *inter partes* hearing on 22 February 2017.

7. The Respondent filed a Replying Affidavit and Notice of Preliminary Objection to the Union's application on 21 February 2017.

8. On the same day, the Kenya Union of Domestic, Hotels, Educational Institutions & Hospital Workers (KUDHEIHA) filed an application (*KUDHEIHA's application*) seeking

1. ...

2. That there be a stay of execution of the judgment delivered by the court on 01/12/2016 and all its consequential orders pending the hearing and determination of this application.

3. That the ex parte proceeding and judgment dated 01/12/2016 delivered by this honourable court be set aside,

4. That the intended interested party/Applicant be granted leave to be enjoined and respond to and defend this cause.

5. That costs be in the course.

9. When the file was called out on 22 February 2017, the Court's attention was drawn to the myriad applications on file and it directed that KUDHEIHA's application be heard first.

### ***KUDHEIHA's application***

10. Mr. Opondo, Industrial Relations Officer who informed Court that he was holding brief for Mr. Onwonga, Industrial Relations Officer sought an adjournment in respect of KUDHEIHA's application but the Court declined the application.

11. After hearing brief addresses, the Court dismissed the application by KUDHEIHA to be enjoined and reserved the giving of reasons which can now be given.

12. One, when the Court delivered its judgment on 1 December 2016, it substantively became *functus officio* and therefore as regards the merits of its decision, there is not much it can do.

13. In so far as *KUDHEIHA* sought to be granted leave to join the proceedings to defend the cause, it was proceeding on a misapprehension of the law on determined suits.

14. Two, in so far as the Union had commenced action to wit Nakuru Cause No. 278 of 2015, *Kenya Hotels & Allied Workers Union v Platinum Outsourcing Logistic E.A. Ltd & Enashipai Resort & Spa*, which is said to be pending hearing and determination, this Cause will be determined on its own merits and if *KUDHEIHA* is interested in being enjoined as an Interested Party, that is matter better left to its judgment.

### ***Claimant Union's motion***

15. The substance of the Union's application is for execution by way of contempt.
16. Execution by the route of contempt should be a last resort and not the ordinary way for enforcement of court orders especially in industrial/labour disputes.
17. The Court is not satisfied that the Union has attempted the other options available to it before seeking to execute by way of warrant of arrests against the Respondent.
18. The Court has also noted that apart from the correspondence exchanged between the Union and Respondent on the signing of the recognition agreement, there is nothing on record to show that a copy of the decree was formally served upon the Respondent.
19. The Court in effect finds the application by the Union as premature.
20. Having disposed of the 2 applications, the Court will hereinafter give directions as to the hearing of the Respondent's application filed in Court on 11 January 2017.
21. KUDHEIHA to pay the Claimant Union's costs of its dismissed application of 21 February 2017.
22. However before penning off, the Court would observe that as is apparent from the record here and in other Causes, this appears to be a continuation of a battle for representation within the hotel industry, which war has been fought ferociously (see the judgment herein and in Nakuru Cause No. 377 of 2015, *Kenya Hotels & Allied Workers Union v Great Rift Valley Lodge/Golf Resort* rendered on 2 September 2016 and the ruling of 14 October 2016 in Nakuru Cause No. 376 of 2015, *Kenya Hotels and Allied Workers Union v Sun Africa Hotels & Ors*), a battle the parties have not been ready to take to the Court of Appeal to resolve once and for all.

**Delivered, dated and signed in Nakuru on this 31<sup>st</sup> day of March 2017.**

**Radido Stephen**

**Judge**

**Appearances**

For Union Mr. Simiyu, Deputy Secretary General, Kenya Hotels & Allied Workers Union

For Respondent Mr. Kimondo instructed by L. Kimondo & Co. Advocates

KUDHEIHA Mr. Opondo, Industrial Relations Officer

Court Assistant Nixon