



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 76 OF 2012

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

VERSUS

PANARI HOTEL.....RESPONDENT

AND

KENYA ASSOCIATION OF HOTEL KEEPERS AND CATERERS...INTERESTED PARTY

Mr. Simiyu for claimant/union

Mr. Olewe for respondent

M/s Guserwa for interested party

JUDGMENT

1. The claimant seeks the respondent Panari Hotel to sign Recognition Agreement with the claimant union and thereafter negotiate with the claimant union and conclude a collective bargaining agreement containing terms and conditions of service for all unionsable employees of Panari Hotel.
2. The claimant in the memorandum of claim filed on 25th January 2012, states that it has recruited more than a simple majority of the unionsable employees employed by the respondent, Panari Hotel and has therefore satisfied the requirements for recognition under Section 54 (1) of the Labour Relations Act, 2007.
3. It is important to note that the respondent does not dispute that the claimant union has recruited 160 employees into its union membership out of 280 total unionsable employees of the respondent, constituting 65% of the unionsable employees of Panari Hotel.
4. It is also not in dispute that the membership has continued to grow in the particular hotel to over 80%.
5. The respondent admits that it has continued to deduct and remit union dues from the employees who are members of the claimant union.
6. No recognition agreement has been signed between the claimant union and the respondent and a dispute was reported to the Ministry of Labour and the Conciliator Mr. R. A. Oliteba, pursuant to

conciliation proceedings recommended to the respondent to recognize the claimant union.

7. The claimant union submits that it has met all the requirements of the law in that, there is no rival union at the Panari Hotel following an award of the erstwhile Industrial Court in Cause 39 of 2007 and 273 (N) of 2009 attached to the memorandum of claim.

8. That the claimant union is the most appropriate and relevant representative union in the hotel industry as per its constitution and that the union has recruited more than 50+1% of the employees of Panari Hotel which constitutes more than a simple majority of all unionsable employees of this particular hotel.

9. The claimant prays that the suit be allowed with costs.

10. The respondent admits in the memorandum of response to the memorandum of claim that the claimant union had recruited one hundred and sixty (160) employees in to the claimant's membership.

11. The respondent has been making payments of union dues in respect of the members pursuant to the check off system forms provided by the claimant and continues to do so provided the employees remain members of the union.

12. The respondent avers in its memorandum of response that it did not refuse to sign the recognition agreement as alleged by the claimant and blames the claimant for rushing to court and instituting a claim in cause no. 180 of 2010 and the suit was dismissed by the court.

13. The respondent avers that it is a member of Kenya Hotel Keepers and Caterers Association (the interested party) which association has a Recognition Agreement and a Collective Bargaining Agreement with the Kenya Union of Domestic, Education Institutions, Hotels and Allied Workers (KUDHEIHA) which documents are annexed to the statement of response.

14. The respondent summarises therefore that the claimant has not satisfied the requirements for recognition under Section 54 (2) of the Labour Relations Act, which provides.

“a group of employers or an employers’ organization including an organization of employers in the public sector shall recognize a trade union for the purpose of collective bargaining if the trade union represents a simple majority of unionsable employees employed by the group of employers or the employers who are members of the employers’ organization within a sector.”

15. The respondent emphasizes that whereas it admits that the claimant has recruited more than a simple majority of its employees at Panari Hotel, it can only oust the interested party and the existing Recognition Agreement between the interested party and the respondent by recruiting 50+1% of employees in all the hotels that constitute the group of employers under the umbrella of Kenya Association of Hotel Keepers and Caterers.

16. The respondent concludes that it does not suffice for the claimant to recruit a simple majority of employees in only one hotel as the claimant has done to oust the existing Recognition Agreement with the group of employers lawfully constituted to provide a suitable and conducive labour environment, providing uniform negotiated terms in the larger part of the hotel sector.

17. That the existing union is sufficiently representative of the whole or of a substantial proportion of the interest of the hotel sector in Kenya and therefore there is not yet room for a rival union.

18. That the claimant is at liberty to recruit members from the employees of hotels that are not members of the interested party and conclude individual recognition agreements and collective bargaining agreements with those individual hotels. That unfortunately, the respondent, Panari Hotel is not one of those hotels who are not members of the interested party.

19. That the suit lacks merit and it be dismissed with costs.

Determination

20. The question for determination is whether it is sufficient for the claimant union to recruit a simple majority of unionsable employees in one hotel which hotel is a member of Kenya Association of Hotel Keepers and Caterers, the interested party, which association has a Recognition Agreement and Collective Bargaining Agreement with a rival union KUDHEIHA covering terms and conditions of service of all unionsable employees of hotels who are members of the association?

21. The Employment and Labour Relations Court in the case of **Kenya Hotels and Allied Workers' Union –v– Attorney General and 6 others [2015] eKLR** with Justice Nduma, Lady Justice Ndolo and Lady Justice Maureen rendered a majority decision to this effect;

“The prayer to order the Registrar of Trade Unions to strike out the words hotels, restaurants, casinos, camp sites catering and similar establishments providing lodging, food, beverages or both and further categories of related establishments providing tourism services from the constitution of the 3rd respondent would in our view infringe on the freedom of association of the 2nd respondent and the employers who are its members as well as the freedom of association of all the employees who are the 3rd respondent’s members within the sector who are not the claimant’s members. Having joined a crowded field by seeking registration in an arena where there was already another player, the claimant must be prepared for the competition and to fight for its share of members. It cannot use an order from this court to get members where it has been unable to recruit over the years. Should it achieve a simple majority among either all the employees in the sector or within any specific hotel it may seek recognition in accordance with the law.

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.

For these reasons the claim here is dismissed. Each party shall bear its costs.”

22. The three judge bench was purposely constituted by the Chief Justice to resolve this long standing question that has for many years fomented industrial disputes in the hotel industry in Kenya.

23. Having participated in this bench and having agreed with the majority decision in the aforesaid case, I am not persuaded to depart from the ratio *decidendi* of the case which is;

“Employers or group of employers enjoy equal right as employees or a group of employees to form, join or participate in the activities and programmes of a trade union or association of employers in terms of Article 41 (1) of the Constitution of Kenya and Section 41 (1) (a) and 6 (1) of the Labour Relations Act, 2007.

24. Similarly, Article 36 of the constitution of Kenya which reads;

“(1) Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind”

Includes both human and legal persons.

25. Therefore, the claimant union and its members do not have a superior right or freedom to that the respondent and the interested party have to enjoy a right or fundamental freedom enshrined in the

constitution. All are equal before the law and are entitled to equal enjoyment of the constitutional rights and fundamental freedoms.

26. It therefore makes no sense to compel the respondent and the interested party to break a long standing relationship willingly and freely entered into by way of a Recognition Agreement in terms of Section 54 (2) of the Labour Relations Act. A relationship under Section 54 (1) based on individual membership is not superior to a relationship under section 54 (2) based on group membership.

27. Accordingly, the court finds no reason to depart from the majority decision in the case of **Kenya Hotels and Allied Workers' Union –v– Attorney General and 6 others [2015] eKLR** supra and dismisses the suit.

28. Costs to follow the outcome.

Dated and Delivered at Nairobi this 19th day of May 2017

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE