



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT MOMBASA

CAUSE NUMBER 163 OF 2014

BETWEEN

KENYA HOTELS AND ALLIED WORKERS UNIONCLAIMANT

VERSUS

SUCHAM INVESTMENTS LIMITED [AMANI TIWI

BEACH RESORT] RESPONDENT

AND

KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL

INSTITUTIONS AND HOSPITAL WORKERS [KUDHEIHA]..... INTERESTED PARTY

Rika J

Court Assistant: Benjamin Kombe

John Simiyu, Industrial Relations Officer, for the Claimant

Menezes Oloo & Chatur Advocates for the Respondent

Hezron Onuong'a, Industrial Relations Officer, for the Interested Party

JUDGMENT

1. The Claimant Union filed its Statement of Claim on 27th March 2014. It states it has a valid Recognition Agreement, with the Respondent, signed on 17th October 2006. These two Parties negotiated, signed and registered a Collective Bargaining Agreement at the Industrial Court, which covered the period 1st February 2007 to 31st January 2009
2. The Respondent Hotel caught fire, and was razed to the ground in January 2009. Business closed down. According to the Claimant, Parties agreed existing employment contracts are terminated, but the Recognition Agreement and CBA would remain in force, till such a time as the Business reopened.
3. The Business reopened on 1st October 2012. The Claimant recruited afresh from the reconstituted bargaining unit. A total of 115 Employees signed up with the Claimant Union. The Claimant submitted check-off lists requiring the Respondent, to remit to the Claimant, trade union dues for the recruited

Employees. The Claimant also wrote to the Respondent, seeking to negotiate a fresh CBA. The Respondent declined both requests.

4. The Respondent threatened not to renew Claimant's Members' contracts, if they did not withdraw from the Claimant Union.

5. Against this backdrop the Claimant Union approached the Court, seeking its assistance, in the following ways:-

a) The Respondent is restrained from victimizing Claimant's Members, on account of their trade union affiliation and activities.

b) The Respondent is compelled to deduct trade union dues from Claimant's Members as per the check-off lists submitted by the Claimant Union.

c) The Respondent is compelled to negotiate fresh CBA with the Claimant Union.

d) The Claimant Union is granted access to its Members within the Respondent's workplace.

e) Costs are paid by the Respondent.

6. The Respondent filed its Statement of Response on 16th April 2014. It concedes there is a Recognition Agreement between the Claimant and the Respondent. The CBA concluded between the Claimant and the Respondent ended after the Hotel burnt down. It was never renewed. All Employees exited through redundancy. They were paid their redundancy dues. The Parties were engaged in Industrial Court Cause Number 111 [N] of 2008, where the Court directed all existing Employees be paid redundancy benefits under the redundancy clause in the CBA. A new Tiwi Beach Resort opened after the inferno, and signed a Memorandum of Agreement with the umbrella Union of Kenya Hotel Keepers and Caterers Association. The Association has a Recognition Agreement, and a CBA, with the Interested Party. The Claimant is therefore not recognized by the Respondent. Lastly the Respondent states the Claim should have been initiated under Section 62 of the Labour Relations Act Number 14 of 2007. It did not go through conciliation.

7. The Interested Party applied to enter the fray, in an Application filed on 7th April 2014. Its position is as stated by the Respondent. The Respondent is a Member of the Hoteliers' Association, which has a CBA with KUDHEIHA, which covers Employees of the Respondent. Most Employees are Members of the Interested Party. The Interested Party was joined to the proceedings with the consent of the Parties, in an order recorded by the Court on 13th May 2014.

8. One Employee of the Respondent, Mbarak Mohammed Vyombo, gave evidence before Justice Stephen Radido, on 30th June 2014. The trial Judge was transferred from the Mombasa station, and file thereafter placed before the incoming Judge, the undersigned.

9. On 21st September 2016, the Parties agreed to have the dispute determined on the strength of the Pleadings, Evidence, Documents and Submissions on the record. They confirmed the filing of Submissions on 6th February 2017.

The Court Finds:-

10. The Claimant Union signed a Recognition Agreement with the Respondent Hotel on 17th October 2006. The Recognition Agreement was for a minimum period of 2 years. It states it would remain in force, until amended, or terminated. A party wishing to amend or modify the Agreement would give the other Party 3 months' written notice. If Parties were unable to obtain agreement on amendment or modification, they were to refer the dispute to the Minister for Labour, under Section 62 of the Labour Relations Act.

11. The Recognition Agreement does not stipulate that it could be terminated through a fire. The fire that gutted the Hotel leading to temporary closure of the Hotel did not terminate the Recognition Agreement.

12. Recognition Agreements are terminated through their own terms, through the National Labour Board under Section 54 [5] of the Labour Relations Act, or through an order of the Court.

13. It is not therefore correct, that the unfortunate fire incident had the effect of terminating the Recognition Agreement concluded by the Claimant and the Respondent on 17th October 2006.

14. If the Respondent felt it was no longer bound by this Agreement after the fire incident, it was open to the Respondent to invoke the terms of the Agreement, and terminate the Agreement; the Respondent had the option to petition the National Labour Board for revocation; or seek an order of the Court to the same end. None of these options was exercised, before Respondent engaged with the Hoteliers' Association and KUDHEIHA.

15. The termination of previous Employees' contracts, and payment of redundancy dues, did not terminate the existing Recognition Agreement.

16. Neither did the Respondent's membership to the Hoteliers' Association. Without formal termination of the Recognition Agreement between the Claimant and the Respondent, subsequent Recognition Agreements with other entities would be of no effect.

17. The Court notes that in ***Industrial Court Cause Number 39 of 2007 at Nairobi, between Kenya Hotels and Allied Workers Union v. Grand Regency Hotel & [Kenya Union of Domestic Hotels, Educational Institutions, Hospitals and Allied Workers & Kenya Hotel Keepers and Caterers Association, as Interested Parties]*** the Court demarcated the areas of representation between the two Unions, finding KUDHEIHA is no longer the appropriate, relevant and representative Union in the Hotel Industry. The Court examined the concept of industrial trade unionism in Kenya, and gave the following orders, in a decision dated **31st July 2008**:-

a) The Interested Party KUDHEIHA shall completely vacate the hotel industry upon expiration of the existing collective bargaining agreements it may have entered into, either individually or collectively in the said industry.

b) There shall be no new CBAs entered into by KUDHEIHA with any Party within the hotel industry.

c) The existing Recognition Agreement, between KUDHEIHA and HOTELIERS' ASSOCIATION, is null and void and of no legal effect, and for avoidance of doubt, is hereby invalidated.

18. The Claimant has filed a copy of the above decision in the proceedings herein. There is nothing brought to the attention of this Court, to suggest the above decision has been reviewed and set aside, or appealed against and overturned.

19. The Hoteliers' Association, of which the Respondent is a Member and the Interested Party, were Parties in the demarcation dispute at the Court in Nairobi. They drew in the Respondent into fresh obligations, fully aware of the decision of the Court on the Recognition Agreement between them.

20. Parties should not burden the Judiciary with new forms of disputes, in which the underlying issues have essentially been settled in past litigation. They should, if not satisfied with earlier decisions, follow up on the review or appellate procedures. Choosing to ignore existing decisions, engenders legal disorder and industrial instability. The two Unions seem to have an uneasy truce and co-existence. They have not implemented the decision of the Court on demarcation. If it is felt this decision of the Court cannot be implemented, because for instance, of KUDHEIHA's longstanding role in the hotel industry, it is for the Trade Unions and the Hoteliers' Association, with the aid of the Trade Union Centre and the Federation

of Kenya Employers, to midwife a long term solution to the recurrent demarcation claims. Judicial determinations are not always fully dispositive of disputes, and are sometimes used as the basis for negotiations amongst the disputants, leading to more binding outcomes. It is not helpful for Parties to occasionally return to Court, in different reincarnations, asking the Court to redraw demarcation lines which the Court has already redrawn. Such an approach has the potential to strain judicial economy.

21. The Claimant Union quite sensibly, recruited Employees afresh, after the fire incident and the reopening of the Hotel. It renewed its right of sole collective bargaining agency. There is no justification in the Respondent opting to thrash Claimant's right of sole collective bargaining agency, granted way back in the Recognition Agreement of 2006. The Agreements concluded by the Respondent, the Hoteliers' Association and KUDHEIHA, in the view of the Court, considering the decision in **Cause Number 39 of 2007**, are as worthless as the sea weeds. They cannot override the relationship between the Claimant and the Respondent, created way back in the year 2006.

22. The Court does not think the Claimant was bound to refer the dispute to the Minister before coming to Court. The Parties were in Court in 2008, essentially over the same issues. Dispute resolution mechanisms are not meant to be a back-and-forth process, where rights and obligations are never fully adjudicated, and disputes resolved and dissolved. IT IS ORDERED:-

a) The Respondent shall not victimize any of the Claimant's Members working for the Respondent, on account of their association with the Claimant Union.

b) The Respondent shall deduct trade union dues from the Claimant's Members as per the Check-Off Lists submitted to the Respondent by the Claimant Union.

c) The Respondent shall negotiate a fresh CBA with the Claimant Union, to be concluded and registered with the Employment and Labour Relations Court within 90 days of this Judgment.

d) The Respondent shall grant the Claimant Union limited access to its Members within the workplace.

e) No order on the costs.

Dated and delivered at Mombasa this 30th day of June 2017

James Rika

Judge