



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 960 OF 2016
BETWEEN
NYALI INTERNATIONAL BEACH HOTEL.....CLAIMANT
VERSUS
1. MPE SHINDO BUNDI
2. STEPHEN MATAISU KIOKO
3. FREDRICK NJOROGE NYUTU
4. JOHANNES MCHAWIA MWARABU
5. THOMAS MALOMBE JOHN
6. KIOKO DAVID KIAMBA
7. DANIEL NDAMBUKI
8. MWINYI M MADZUMBA
9. JACKSON KISILU NZIOKA
10. HARRISON MBIKU
11. PASCAL MWAMUYE
12. ONESMUS D. MUTISYA
13. LAZARUS OMAMO
14. KYALO MUTHOKA
15. DAVIDSTONE KURA NZUNGULA
16. ERIC ANGUSA MUKEYA
17. DANIEL NGIGE

18. LAWRENCE TSORI
19. SIMON MUTUKU
20. KIOKO KAKULI
21. DAMIAN MUTHOMI
22. MARTIN SHISIA
23. GERALD MWOJA
24. JULIUS KAMBALE
25. CARLOS WASWA
26. PASCAL TUNJE
27. BEATRICE OCHOLA
28. JANET AKINYI
29. KASSIM KALUME NGOLLO
30. PETER MULANDI
31. PAUL JUMA ABILA
32. ISAACK OGUL
33. MARY ANNE ACHIENG' AYO O
34. DOMINICK KAGASI
35. ALFRED KITHINJI RUU
36. DICKSON KISILU KIMUY
37. FLORA AYESA IKUTWA
38. SAMUEL KAMAU KARIUK
39. ANTHONY OCHIENG' OMONDI
40. JAMES MUTHAMI MUTUN
41. GILBERT RUNGUA
42. SALOME MUKABWA
43. MICHAEL MWAI MATHAI
44. SEIF ALI
45. LUCY NJERI

46. VIVIAN BANDA
47. FRANCIS MAINA MURIITHI
48. MONICA KADOWE
49. ALBERT PEKU
50. ALEX MUANGE
51. NELSON IDDI
52. NASSOR MOHAMED MWAPESA
53. FLORENCE KISAKA
54. PILI KAHINDI KITHI
55. AGNES MWALUMA
56. LILLIAN MARIGA IRUMBA
57. DANSTON KHAYEGA
58. MWAYUGA HUDSO
59. ELSOPHAN WANDERA
60. TOBIAS MKAYA
61. PETER MUTHENGI
62. TEBRA IMARI EBUYA
63. BOAZ OTIENO OLOTO
64. RUPHENCE NJEGHE KITAWA
65. BAKARI TSULU MWADUDU
66. JOSEPHINE SAKI
67. SAMUEL NGAO
68. TERESY MUTHEI MAILU
69. PHILEMEON MWANGASHI MARI
70. ALEX CHARO MKOKA
71. GRACE CHAO MWABILI
72. LILIAN CHEGE
73. IRENE APIYO

74. DANIEL ORITO
75. RICHARD OCHAMI
76. SHADRACK MAKUPE
77. JUMA MASHALA
78. TUKIKO OJWANG'
79. GEORGE INGASO
80. RASHID ATHUMANI KASSIM
81. DOMINIC MUTHUVI
82. NETO AUGUSTINO
83. DUNCAN LENJO
84. ALFRED M. MUSYA
85. JOHN NJERU MPURIA
86. BRYSON MWANJALA
87. HAMISI BAKARI
88. PETER KOECH
89. GASPER OKWACHI MWANYOTA
90. WASHINGTON O WAKA
91. JAMES MVURYA WANINI
92. TSUMA NYAMAWI
93. AMUR ABDALLA
94. VICTOR GITONGA
95. THOMAS ELVIS KIPLANGA
96. ISAAC WANAMBUKO MATSILI
97. JAMES NYUMU KIOKO
98. DAVID EMBWAKA MATSILI
99. JAMES MADAKAA
100. PAUL MBOYA
101. BENSON MUTIMBA

102. EDWARD CHOME
103. ISSACK SONJE
104. SAMUEL KARIUKI KAMAU
105. KASSIMU SIMIDI BULIMU
106. VICTOR MWAKWARI MAGHENYI
107. JOSEPH NGOA
108. MOKI MUTHAMA
109. DONALD TUVA
110. JAMES VUNDI
111. HUMPHREY MAINA
112. MORRIS JILANI
113. SCOVIA SOITA
114. UHURU MUTUA
115. DUNCAN LUVASO
116. KENNEDY SAMUEL GUNGA
117. DICKSON ADUDA
118. ARTHUR SHIKANGA
119. BERYL ATIENO
120. DANIEL YALLA
121. JOEL NYANDORO
122. MOSES OMULO ODHACH
123. REUBEN SHIEMI ISSIYE
124. RUDY GAKURE
125. RACHEL WANJALA
126. NAHASHON MLATI
127. SAMUEL K. MUNALA
128. SIMON MWANGEMI
129. JOSHUA MUGWIRIA

130. SAID USAMA

131. DENNIS NYANDEGE MARIITA

132. BENSON LUGANJI

133. MOHAMED MZEE

134. TABITHA MOGIRE

135. EMILY OYUGI

136. PETER MUTHENGI

137. HARRISON MWARINGA

138. GARDINER ARUNGA

139. JONATHAN SULUBU

140. JOHN NJUGUNA MUKIRI

141. ERNEST MUTUNGI PETER

142. CAXTON NGONYO NGUMBAO

143. ELIZABETH WALI WACHIA

144. PETER GARAMA

145. NELLIE W. MACHARIA

146. ALFANI SALIMU MWAZECH....RESPONDENTS

RULING

1. The Claimant is a Beach Hotel at Mombasa, the Respondents its Employees. On 25th November 2016, the Respondents wrote to the Claimant a 14- day notice, calling on the Claimant to pay them their arrears of salary, allowances and service charge in full, failing which they would stage a sit-in, until payment is made in full.

2. The Claimant filed this Claim on 16th December 2016 under Certificate of Urgency, seeking a declaration that the intended industrial action by the Respondents is illegal; the Respondents are permanently restrained from calling for industrial action without following the proper channel as provided for under the applicable CBA; and the Court issues directions for conciliation as a matter of urgency.

3. With the Claim is filed an Application for interim measures. The Claimant seeks to have the Respondents compelled to withdraw their sit-in notice pending hearing and determination of the Application; the Respondents are restrained from calling for any other industrial action against the Claimant pending hearing and determination of the Application; the Respondent are restrained from calling for industrial action against the Claimant without following due procedure, pending hearing and determination of the Claim; the intended Industrial action is declared illegal, un-procedural and unprotected; the Court issues directions on conciliation; and costs be in the cause.

4. The Court granted interim measures to the Claimant on 16th December 2016 restraining the

Respondents from going on with the intended sit-in, and granted the Respondents 7 days to file their Response. It was ordered the Claimant serves the Summons and Pleadings upon Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers, who represent the Respondents.

5. The Respondents filed an Application dated 8th February 2017, now acting through their Union KUDHEIHA, asking the Court to order the Claimant to pay their arrears of salary, calculated at Kshs. 9,745, 0000 at the time of filing the Application. The Claimant filed a Replying Affidavit through its Resident Manager Peter Kiarie sworn on 22nd February 2017. Its position is that the Claimant has paid the Respondents their salaries and service charge. Kiarie further states the Respondents disobeyed the Court order and went ahead with their sit-in in the presence of journalists whom they had invited to give coverage.

6. The Claimant also filed a Notice of Preliminary Objection against the Respondents' Application. It is submitted that the grievances or complaints raised in the Application are localized and subject to the determination of the Coast Disputes Committee and or the Joint Industrial Council, under the Parties' Recognition Agreement.

7. Parties agreed the 2 Applications and the Preliminary Objection are considered and determined on the strength of the record. They confirmed the filing of their Submissions at the last mention in Court, on 21st March 2017.

The Court Finds:-

8. There is no point in over-blowing this dispute. At the core is a grievance by the Employees about non-payment by the Employer, of their salaries and service charge. As a means of recovering what they think is owed to them, the Employees threatened to withhold their labour. The Employer instigated this Claim, to protect its business from the disruption that comes with such industrial upheavals.

9. The Claimant's position is that the Respondents have been paid their salaries and service charge. The dispute is whether payment has been made or not. It is a dispute which can be resolved by the Labour Officer, investigating the employment records at Nyali Beach Hotel, in the presence of the representatives of the Management and KUDHEIHA, and ascertaining if salaries and service charge have been paid. If they have been paid then the dispute should resolve itself. If they have not been paid, then the Court suggests we try the following:-

- a) The Labour Officer has the option of prosecuting the Claimant's Management for wage offences.
- b) The Respondents, if confirmed they are owed salaries and service charge, have the right to withdraw their labour, but only under the industrial action mechanisms and procedures contained in KUDHEIHA Constitution and the Recognition Agreement between KUDHEIHA and the Union of Kenya Hotelkeepers and Caterers Association, of which the Claimant is a Member.
- c) The Labour Officer shall file his Report in Court detailing if salaries and service charge are owed, and the Respondents shall be at liberty to apply for summary judgment against the Claimant, based on the findings of the investigation.
- d) The Court does not agree with the Claimant that the grievance raised through the Respondents' application is localized and beyond the jurisdiction of the Court. Salaries and wages are protected and it is the duty of the Court throughout, to ensure they are paid when they fall due, and ensure offenders are punished under the Employment Act and the Labour Institutions Act. Why would the dispute raised by the Claimant fall within the jurisdiction of the Court, while that raised by the Respondents is deemed premature?

10. The right to industrial action is a useful tool in the hands of Employees, in enforcing employment rights. It should not be stifled. It is as good as the execution of a decree issued by the Court. It compels

compliance. It should however be exercised within the confines of existing workplace labour contracts. Exercised otherwise, it becomes an out-law industrial action. Lastly, the Court wishes to emphasize that alternative dispute resolution mechanisms should not be manipulated to muddy, delay or deny Employees' right to the toil of their labour. Salaries and wages must be paid when they fall due, unless the Employee has given his consent for deferment.

IT IS ORDERED:-

- a) The order barring the Respondents from engaging in industrial action is extended for 40 days from the date of this ruling.***
- b) Proceedings before this Court are stayed for 40 days, and the dispute referred to the County Labour Office for investigation.***
- c) The County Labour Office shall, in the presence of Claimant's Management and KUDHEIHA Officials examine Employees' records at the Hotel, and find out if there are salaries and service charge owed.***
- d) At the end of 30 days the Labour Officer shall file his findings with the Court, and avail copies to the Parties, after which, depending on the findings, the Respondents may pursue industrial action under the procedure contained in their Unions' Recognition Agreement and Constitution; the Labour Officer may prosecute Management for wage offences; or the Respondents apply in Court for summary Judgment of ascertained arrears of salary and service charge.***
- e) The 2 Applications and Objection filed by the Parties are disposed of on these terms.***
- f) Both Parties shall extract a copy of this Ruling and Order, and serve it upon the County Labour Office Mombasa.***
- g) Parties shall move the Court at the end of 40 days from the date of this Ruling.***
- h) Costs in the cause.***

Dated and delivered at Mombasa this 12th day of June 2017.

James Rika

Judge