



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

AT NAIROBI

CAUSE NO. 1490 OF 2017

KENYA HOTELS & ALLIED WORKERS UNION.....CLAIMANT/APPLICANT

VERSUS

GOLDEN JUBILEE LIMITED T/A CROWNE PLAZA NAIROBI.....RESPONDENT

RULING

1. The Claimant Union seeks through the Notice of Motion application dated 31st July 2017, for orders restraining the Respondent by its agents from victimizing/intimidating, threatening, and or coercing the Claimant members on account of union affiliation; and that pending the hearing and determination of the application the Respondent be restrained from deducting the Claimant members union dues in favour of the purported rival union KUDHEIHA and that the Respondent be restrained from dismissing or suspending the Claimant members who have declined to forcefully subscribe to the rival union KUDHEIHA and that the check off list to KUDHEIHA effective 18th July 2017 be invalidated. The Claimant also sought to be granted access to its members.

2. The Respondent was opposed and filed a Replying Affidavit from the Human Resources Manager of the Respondent. In the affidavit the manager deponed that the Respondent was a member of the Kenya Association of Hotel Keepers & Caterers, an employer's organisation which has a recognition agreement with the Kenya Union of Domestic, Hotels, Education Institutions, Hospitals and Allied Workers (KUDHEIHA). The Respondent's HR Manager deponed that the employer's union had negotiated several collective bargaining agreements with KUDHEIHA. She deponed that the requirement of recognition under the law is for the union to have a simple majority of the employees employed by the employer. She further deponed that an employer may not deduct dues from an employee who has notified the employer in writing of that employee's resignation from the union in question.

3. The parties opted to dispose of the motion by way of written submissions. The Claimant filed its submissions on 3rd October 2017 while the Respondent filed its submissions on 19th October 2017. In their submissions the Claimant isolated the issue in dispute as the refusal by the Respondent to sign a recognition agreement, deduct union dues and allow the trade union access to her members and victimisation of the Claimant members due to affiliation to the Union. The Claimant submitted that between February and June 2017 it recruited 139 unionisable employees out of 186 attaining 74.7% membership above the threshold laid down in Section 54(1) of the Labour Relations Act, 2007. The Claimant submitted that the Respondent declined to sign the recognition agreement and resorted to threatening and victimizing employees who had voluntarily subscribed to the Claimant to coerce them to join the rival union KUDHEIHA against their wish. The Claimant submitted that the refusal to sign recognition agreement is an unlawful contravention of the Labour Relations Act and prejudices the

Claimant member's constitutional rights enshrined in Article 36 and 41 of the Constitution of Kenya 2010. The Claimant union thus urged the Court to exercise its constitutional authority to enforce the rights enshrined therein in favour of the aggrieved members of the Claimant and grant the motion. The Respondent on its part submitted that three major conditions must be met in line with the provision of the Labour Relations Act 2007 and the Industrial Charter. The Respondent stated that these three conditions are as follows:-

1. The union must have recruited a simple majority of the unionisable employees of the company or association
2. The union must be the rightful union to represent the employees in the sector
3. There should be no rival union

The Respondent submitted that whereas the Claimant union contends that it is the rightful union and have recruited a simple majority of the unionisable employee, the Respondent already has a recognition agreement through the Hotel Keepers and Caterers Association. It was submitted that there is a CBA in place. It was submitted that the requirements for recognition are per Section 54(2) of the Labour Relations Act, 2007. The Respondent submitted that just as the workers have a right to join and leave a union as provided for under Section 4(1)(b) and (c) of the Labour Relations Act 2007, the employer likewise has similar provisions under Section 6(1)(b) of the same Act to join an employer's organisation or federation of employer's organisation. It was submitted that the Court should not be seen to be aiding in the disorganisation of the Respondent. Reliance was also placed on the case of **Kenya Hotels and Allied Workers Union v Pangoni Beach Resort [2014] eKLR**. In that case, O. Makau J. held that the Respondent was entitled to decline to recognise a union which was not representative of the industry.

4. The dispute is one that is clearly on the representation of the employees of the Respondent. The Claimant asserts that it has the requisite numbers that permit it to be recognised by the Respondent as representing a majority of the employees of the Respondent. The depositions on record for the Claimant and Respondent respectively are at variance with the opposite side. Section 4 of the Labour Relations Act provides that an employee has the right to join or leave a union. Under 4(1)(a), (b) and (c) it provides as follows:-

4.(1) Every employee has the right to –

(a) participate in forming a trade union of federation of trade unions;

(b) join a trade union; or

(c) leave a trade union.

Section 6 of the same act provides as follows:-

6.(1) Every employer has the right to?

*(a) participate in forming an employers' organisation or a federation of employers organisation;
and*

(b) subject to its constitution, join an employers organisation or a federation of employers' organisations.

These safeguards are in existence for each of the two parties before court. Section 54(1), (2) and (3) of the Labour Relations Act makes provision as follows:-

54.(1) An employer, including an employer in the public sector, shall recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable

employees.

(2) A group of employers, or an employers' organisation, including an organisation of employers in the public sector, shall recognise a trade union for the purposes of collective bargaining if the trade union represents a simple majority of unionisable employees employed by the group of employers or the employers who are members of the employers' organisation within a sector.

(3) An employer, a group of employers or an employer's organisation referred to in subsection (2) and a trade union shall conclude a written recognition agreement recording the terms upon which the employer or employers' organisation recognises a trade union.

It is clear that the Respondent herein has a recognition agreement in terms of Section 54(3) of the Labour Relations Act and all that needs to be established is whether the employees of the Respondent are members of one or the rival union. A simple census would establish the factual position and in that regard. Since one cannot be forced to join or leave a union or federation, the court will require to establish the facts. Given that the Court is alive to the dispute resolution mechanism that exists under the Ministry of Labour, I hereby direct that the parties refer the dispute to the Cabinet Secretary for Labour and obtain the services of the Ministry to determine the numbers of employees in the Respondent who have joined the rival union. A report to this effect must be filed within 30 days of today. The Court will thereafter determine if there are any merits in the claim before Court.

It is so ordered.

Dated and delivered at Nairobi this 6th day of November 2017

Nzioki wa Makau

JUDGE