



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 377 OF 2015

**KENYA HOTELS & ALLIED WORKERS
UNION.....CLAIMANT**

v

GREAT RIFT VALLEY LODGE & GOLF RESORT/

**GREEN PARK GOLF & COUNTRY
COMPLEXRESPONDENT**

KENYA UNION OF DOMESTIC, HOTELS,

**EDUCATION INSTITUTIONS, HOSPITALS & ALLIED WORKERS.....
INTERESTED PARTY**

JUDGMENT

Background

1. The Kenya Hotels & Allied Workers Union (Claimant) moved Court on 27 November 2015 under certificate of urgency seeking that the instant Cause be determined on a priority basis as it related to a recognition dispute.
2. The Court certified the application urgent on the same day and directed that it be served upon the Great Rift Valley Lodge & Golf Resort/Green Park & Country Resort (Respondent) for *inter partes* hearing on 15 December 2015.
3. When the motion was called out on 15 December 2015, the Respondent indicated that it did not oppose it.
4. But before the Court could give directions/ruling, a Mr. Onuonga, Industrial Relations Officer, Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals & Allied Workers (Interested Party) made an oral application to be enjoined in the proceedings.
5. The reason given was that the Interested Party had a recognition agreement with the *Kenya Union of Hotel Keepers & Caterers* (named also by the parties in documents filed as **Kenya Association of Hotel Keepers and Caterers; Kenya Hotel Keepers and Caterers Association or Union of Kenya Hotelkeepers and Caterers Association**), of which the Respondent was a member.
6. In view of the fact that the Claimant and the Respondent did not oppose the joinder of the Interested Party, the Court allowed the oral application and directed that the Respondent and the Interested Party do

file their papers before 18 January 2016.

7. Come 18 January 2016, the Interested Party had not filed any papers and it sought for 14 more days.

8. The request was not opposed and the Court granted the Interested Party until 30 January 2016 and set mention for 17 February 2016 to confirm compliance.

9. On 17 February 2016 when the file was initially called out, none of the parties were present.

10. Later on, the Interested Party's counsel, Ms. Wachira informed the Court that she had not filed any papers because she had only received the documents from the Interested Party on 16 February 2016 (counsel did not seek leave to file the papers outside the set time during this appearance).

11. The Respondent on its part indicated that it had filed all its papers and also that it would raise a preliminary issue.

12. The Court directed the Claimant to file its replies to the Responses before 26 February 2016, and the Respondent was directed to file and serve its preliminary objection before 4 March 2016. The Court set the Cause for mention on 9 March 2016.

13. The Respondent did not file the preliminary objection by 4 March 2016 as ordered, but indicated during the mention that it had addressed the preliminary issue in its written submissions, and proposed that the Cause could be determined on the basis of the record and submissions.

14. The Interested Party, on the other hand sought for 7 more days to file its documents.

15. The Court thus directed that the Cause be determined on the basis of rule 21 of the Employment and Labour Relations Court (Procedure) Rules, 2016; the Interested Party do file any necessary documents before 16 March 2016; Claimant do file and serve submissions before 30 March 2016; Respondent and Interested Party to file submissions before 15 April 2016 and that the Cause be mentioned on 22 April 2016 (court did not sit on that day).

16. The Cause was consequently mentioned on 27 July 2016, and the Interested Party's counsel informed the Court that she had not filed further documents/ submissions and that she wanted to withdraw from acting.

17. The Respondent's submissions had also not been filed and Ms. Wachira on behalf of Mr. Ambenge indicated that the submissions would be filed in the course of the day.

18. The Court directed Ms. Wachira to file a formal application to cease from acting before end of 28 July 2016, and the Respondent to file its submissions before 28 July 2016 and set mention for 29 July 2016.

19. On 29 July 2016 when the file was called out, the Respondent disclosed that it had again not filed its submissions, and the Court directed it to file the submissions before close of day.

20. On the application by Ms. Wachira to withdraw, there was evidence of service and the Court allowed it.

21. The Claimant however made strong submissions that the Interested Party had abused the Court process and that its conduct was meant to delay the determination of the Cause.

The instant dispute

22. The present Cause is seeking recognition and therefore the question arising for determination is primarily whether the Claimant has met the statutory threshold set out in section 54 of the Labour Relations Act for grant of recognition by the Respondent.

Simple majority threshold

23. According to the Claimant, it had recruited 218 out of 230 unionisable employees of the Respondent in June 2015 which translated to 94%, and thus surpassed the simple majority requirement.
24. However, the Respondent declined to grant it recognition and a trade dispute was reported to the Cabinet Secretary but no resolution was reached hence the Court proceedings.
25. The Respondent on the other hand contend that in June 2015, it received some 154 letters from employees expressing their withdrawal from membership of the Claimant and instructing that deduction of union subscriptions be stopped.
26. A further bunch of 78 letters were received between July and December 2015.
27. The Respondent did not file/produce any letter from any of the 154 or (78) employees indicating that they were withdrawing from membership of the Claimant.
28. The only withdrawal letters were filed by the Claimant and the letters were referenced, ***Withdrawal from KUDHEIHA Workers Union.***
29. The Respondent's contention that the employees had expressed an intention or had withdrawn from the Claimant is therefore not supported by evidence.
30. The withdrawal letters rather indicate that the employees were abandoning or disowning the Interested Party union KUDHEIHA.
31. Further, the Certificate by the Conciliator (the office has statutory backing in resolution of industrial and employment disputes and their findings as fact finders ought not to be ignored by the Courts without a demonstration of material errors of fact or law) filed in Court indicates that the Respondent had commenced deduction of monthly union subscriptions in respect of some 200 employees (and hence met the simple majority requirement).
32. The Respondent did not deny that at the material and relevant time for determination of the recognition question it had 230 unionisable employees.
33. It has also not denied that the Claimant had recruited 218 of the unionisable employees.
34. The Court therefore finds that the Claimant had in its membership at the relevant and material time not less than 200 and not more than 218 employees of the Respondent out of a unionisable total of 230.
35. Even using the lower figure of 200 employees, the Court is satisfied that the Claimant had recruited more than a simple majority of the Respondent's unionisable employees.
36. The Respondent also raised a defence that the Claimant ought to recruit a simple majority of unionisable employees employed by members of the *Union of Kenya Hotelkeepers and Caterers Association* of which it is a member and not just one employer member.
37. On this score, the Respondent sought solace in section 54(2) of the Labour Relations Act to press the argument that the Claimant could not claim recognition from only one member of an employer's organisation.
38. The Respondent relied on the decision of Nduma, Principal Judge in Nairobi Cause No. 1394 of 2014, *Kenya Hotels and Allied Workers Union v Hilton Hotel Nairobi*.
39. At para 17 the Judge found

... the claimant union to dislodge KUDHEIHA from being the sole union to negotiate the terms and conditions of employment of the employees of Hotels who are members of the Association, it has to recruit a simple majority of the employees of the Hotels who are members of the Association and not a simple majority on one hotel only.

40. With much deference to my brother Judge, I hold a contrary view.

41. In my view the right of every worker in Article 41(2)(c) of the Constitution to form, join or participate in the activities and programmes of a trade union; Article 41(4)(b) to organise coupled together with the right to freedom of association in Article 34 of the Constitution cannot be subordinated to the provision of section 54(2) of the Labour Relations Act.

42. That statutory provision predates the Constitution 2010 and serves to unduly restrict the rights of workers and trade unions.

Rival union/current valid recognition agreement with KUDHEIHA

43. The Respondent made much of a defence that the *Union of Kenya Hotelkeepers and Caterers Association* of which it is a member had a recognition agreement with the Interested Party pursuant to which a collective bargaining agreement was concluded.

44. The Court had earlier made reference to the different names of the employers' organisation.

45. The Respondent exhibited a certificate of membership to an entity known as *Kenya Association of Hotelkeepers and Caterers*.

46. At the same time it exhibited a Memorandum of Agreement between the *Union of Kenya Hotelkeepers and Caterers Association* and the *Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA WORKERS)*.

47. The Court will assume, because the parties know better the official name of the entities involved, that the formal name of the employers' organisation is the *Union of Kenya Hotelkeepers and Caterers Association*.

48. The recognition agreement between the Interested Party and the *Union of Kenya Hotelkeepers and Caterers Association* was signed in 2006.

49. However, this Court's predecessor in Nairobi Cause No. 39 of 2007, *Kenya Hotels and Allied Workers Union v Grand Regency Hotel* held that the Interested Party was no longer the appropriate, relevant and representative union within the hotel industry and ordered it to completely vacate the hotel industry upon expiry of then existing collective bargaining agreements (both the Interested Party and the *Union of Kenya Hotelkeepers and Caterers Association* were parties to that litigation).

50. Because of that judgment, the Interested Party has no legal foundation to continue or purport to continue to represent the interests of the Respondent's unionisable employees.

The demarcation report

51. The Claimant also made reference to a demarcation report in a dispute involving it and the Interested Party where it was recommended that the *Union of Kenya Hotelkeepers and Caterers Association* should negotiate individual agreements with the Union that had achieved a simple majority.

52. The Court is satisfied on the basis of the demarcation report and the finding that the Claimant has achieved the simple majority threshold that it is a proper union to be granted recognition.

53. Before concluding, a few words on the conduct of the Interested Party.

54. The Interested Party did not comply with court orders/directives severally. No tangible or sufficient reasons were given.

55. From the decisions placed before Court, it is clear beyond doubt that the relationship between the Claimant, Respondent and Interested Party over representation within the hotel industry has not only been acrimonious but also subjected to litigation which ended in favour of the Claimant.

56. The Interested Party thus had deep insights and knowledge but instead opted to try all the tricks in the book to delay the expeditious determination of this Cause. It was attempting to delay the wheels of justice well aware that the predecessor of this Court had ordered it out of the hotel industry.

57. There was no hint that it appealed that decision.

58. The Interested Parties conduct was reprehensible and for this it is the view of the Court that it should be ordered to pay the Claimant costs.

Conclusion and Orders

59. The Court finds and holds that the Claimant has met and satisfied the requirements for grant of recognition agreement and orders that

(a) The Respondent grants the Claimant recognition within 21 days from today.

(b) Interested Party meets the Claimant's costs of Kshs 50,000/-.

(c) The Respondent meets its own costs.

Delivered, dated and signed in Nakuru on this 2nd day of September 2016.

Radido Stephen

Judge

Appearances

For Claimant Mr. Simiyu, Industrial Relations Officer, Kenya Hotels & Allied Workers Union

For Respondent Mr. Masese, Senior Legal Officer, Federation of Kenya Employers

Interested Party counsel withdrew on eve of hearing

Court Assistant Nixon