REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 185 CONSOLIDATED WITH CAUSE 186 OF 2015

KUDHEIHA WORKERS.....CLAIMANT

VERSUS

SWEET WATERS TENTED CAMP T/A OLPEJETA RANCHING

LIMITED..... 1ST RESPONDENT

SERENA HOTELS.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 11th November, 2016)

JUDGMENT

The claimant union filed the memoranda of claims on behalf of its members(the grievants) Peter Wamugunda and James Koskei in Cause No. 185 of 2015, and, William Gichuki, James Mwangi Nyabuto, John O. Mwanga and 38 others in Cause 186 of 2015. The claimant prayed for judgment against the 2nd respondent to pay the grievants their retirement or terminal benefits as per the collective agreement and as computed in the pleadings. The claimant also prayed for costs of the suit.

The 1st respondent filed the statements of defence in both cases through Coulson Harney Advocates. The 2nd respondent filed the statements of response in both cases through Namachanja and Mbugua Advocates. The respondents prayed that the claimant's suits be dismissed with costs.

A company known as Lonrho Hotels ran the Sweet Waters Tended Camp (hereafter **'the Camp'**). In October 2004, Lonrho Hotels closed down after selling all its operations in Kenya. The 1st respondent was the owner of the Camp. In January 2005, the 1st respondent paid all employees, including the grievants, all the gratuities that had accrued during the period of employment with Lonrho Hotels. Thus, the 1st respondent became discharged from any further obligations to the employees.

In February 2005, the 2nd respondent was appointed to manage the Camp on behalf of the 1st respondent until 01.01.2012 when the 2nd respondent assumed the positions of both the owner and manager. The letters of employment issued to all employees are clear that the employees had no claims against the 1st respondent up to and including 01.02.2005 – the effect being that up to 31.01.2005, the employees had no valid claims for gratuity as against the respondents. Each employee signed a clearance certificate confirming that for the period up to 31.01.2005 the employee had no further claims against the 1st respondent for service gratuity and that the contents of the certificate had been translated to a language the employee understood as necessary and the employee understood the same accordingly.

On 01.01.2012, the 2nd respondent took over from the 1st respondent the employees' accrued retirement and termination gratuities as well as pending leave and off duties with effect from 01.02.2005.

The claimant's case is that the employees expected that upon the sale of the Camp by Lonrho Hotels on 01.02.2005, the employees would have been declared redundant and paid off all their dues in terms of severance pay for the number of years served and redundancy notice period as per the collective agreement. The claimant's further case and in alternative, is that, if the new employer decided to continue with the services of the employees with full benefits for past services, then the redundancy would not take effect and upon leaving employment at a future date, normal terminal benefits would be payable as per the number of years served and gratuity paid for the period in employment. The claimant relies upon clause 11(vi) of the collective agreement which provides that where in event of a change in the management or ownership of an establishment, the incoming manager, management or owner undertakes to continue the employment of employees with full benefits for past services, then in such cases it shall not be deemed to be or fall within the definition of redundancy but the union shall be informed of the change.

The court has considered the pleadings, the evidence and the submissions and decides the matters in dispute as follows.

The **1st issue** for determination is whether, upon the sale of the Camp by Lonrho Hotels on 01.02.2005, the employees were declared redundant and paid off all their dues in terms of severance pay for the number of years served and redundancy notice period as per the collective agreement. The evidence is that by a notice dated 29.09.2004 all employees were informed that Flora and Fauna International had purchased the shares of Ol Pajeta Ranching Holdings Netherlands BV from Lonrho Africa. Ol Pajeta Ranching Holdings Netherlands BV therefore remained the owner of Ol Pejeta Ranching Limited and all staff remained employed by Ol Pejeta Ranching Limited together with all accrued services. The terms and conditions of service remained the same as per union collective agreement and existing contracts and operations remained exactly as normal. By reason of that letter, the court returns that clause 11(vi) of the collective agreement applied as there was no redundancy because within the meaning of the clause, Ol Pejeta Ranching Limited as the new owner of the Camp continued the employment of employees with full benefits for past services. Thus there was no redundancy in view of provisions of clause 11(vi) of the collective agreement and the employees would not be entitled to redundancy package as provided for in the collective agreement.

The **2nd issue** for determination is whether the service gratuity paid to the employees for the period of service up to and including 31.01.2005 was an advance pay for gratuity. The evidence is that each employee signed stating that for the period up to and including 31.01.2005 the employee had no further claims against the company, Ol Pejeta Ranching Limited, for service gratuity. The court finds that the same amounted to a binding contract between the parties and the employee cannot turn around and allege that the pay was a mere advance payment for gratuity.

Even if the formula applied was erroneous or the service in terms of the completed years of service was erroneously computed, the court considers that the cause of action in that regard would be time barred under section 4 of the Limitation of Actions Act, Cap 22 (6 years from February 2005), or even under section 90 of the Employment Act, 2007 (3 years from 29.06.2012 when the employees were notified by letter that the 1st respondent had ceased to own the Camp and gratuity liability for the new owner and manager, the 2nd respondent would be effective 01.02.2005 when the employees became employed by the Serena Hotels on behalf of the 1st respondent, Ol Pejeta Conservancy) – the suits having been filed on 26.10.2015. Accordingly, the court would not have jurisdiction to investigate the merits of the claimant's claims that the payment of gratuity for service prior to 01.02.2005 was an advance payment of service gratuity and in any event there has not been established that such was the position at payment of the gratuity – the evidence on record being that the gratuity paid for service prior to February 2005 was full and final pay for that prior service and without further claims.

The **3rd issue** for determination is whether the grievants are entitled to reckoning of the months carried

forward (after computation and payment of gratuity for the service prior to February 2005) in the computation of their final gratuity.

The evidence shows that after payment of gratuity for service prior to February 2005 some employees were given letters showing the months carried forward in their continued service. It is clear that there was no break in the service and the claimants would be entitled to reckoning of those months carried forward as part of their service in computing their final service gratuity as part of the service commencing February 2005. The minutes of the meeting held on 23.02.2005 show that the General Manager one Richard Vigne (claimant's exhibit 3 in cause 186 of 2015) explained as much and the letters issued to individual employees would show each employee's number of months as carried forward.

The **4th issue** is whether the grievants would be entitled to a step by step explanation on how the final service gratuity was computed for purposes of payment into individual employee's pension scheme account. In the opinion of the court the employee is entitled to an itemised computation of the service gratuity transferable to the pension scheme account by reason of expansion of section 20 on itemised pay statement and by reason of a fair labour practice under Article 41 of the Constitution.

Taking all the circumstances and facts of the case into account, the court returns that both respondents were necessary parties to the suit and to balance justice each party shall bear own costs of the suit.

In conclusion, judgment is hereby entered for the parties with orders as follows:

a) The grievants are not entitled to payment of gratuity for the service prior to 01.02.2005 as the same was duly paid and any such claims would in any event be time barred under the relevant statutory provisions as found by the court accordingly.

b) The declaration that the grievants are entitled to reckoning of the months carried forward (after computation and payment of gratuity for the service prior to February 2005) in the computation of their final gratuity and as per the letter indicating such number of days carried forward issued to the individual grievant about such days.

c) The declaration that the grievants are entitled to a step by step explanation on how the final service gratuity was computed for purposes of payment into individual employee's pension scheme account; and the 2nd respondent to prepare the relevant computation and file and serve by 15.12.2016 and any emerging reconciliation issues be resolved in accordance with the parties' agreed grievance management provisions.

d) Each party to bear own costs of the suits.

Signed, dated and **delivered** in court at **Nyeri** this **Friday, 11th November, 2016.**

BYRAM ONGAYA

JUDGE