



REPUBLIC OF KENYA  
 IN THE INDUSTRIAL COURT AT MOMBASA  
 CAUSE NUMBER 232 OF 2013

**BETWEEN**

KENYA HOTELS AND ALLIED WORKERS UNION.....CLAIMANT

**VERSUS**

- 1. THE SHESHE BEACH RESORT t/a TABORA ENTERPRISES LIMITED
- 2. IQBAL RHEMTULA MANJI ..... RESPONDENTS

**AND**

EDMUNDO BUFFA ..... INTERESTED PARTY

*Rika J*

*Court Assistant: Benjamin Kombe*

*Mr. John Simiyu, Industrial Relations Officer for the Claimant*

*No appearance for the Respondents*

*Ms. Otieno instructed by Aoko Otieno & Associates, Advocates for the Interested Party*

ISSUE IN DISPUTE: REDUNDANCY

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. The Claimant Trade Union filed its Statement of Claim on 30<sup>th</sup> July 2013. The Claimant states it has a Recognition Agreement with the 1<sup>st</sup> Respondent Hotel which is based at the South Coast of Kenya. The 1<sup>st</sup> Respondent acquired the business from the 2<sup>nd</sup> Respondent under a Lease Agreement, covering the period between 2010 and 2015. It is alleged by the Claimant that the 1<sup>st</sup> Respondent closed down the Hotel in May 2013, declaring part of its Staff positions redundant. The Claimant approached the Court under certificate of urgency seeking the following Orders against the Respondents:-

- a. The Respondents be restrained from handing over the Hotel pending the hearing and

determination of the Claim.

- b. The 1<sup>st</sup> Respondent is restrained from continuing to declare Workers redundant pending hearing and determination of the Claim.
- c. The 1<sup>st</sup> Respondent is compelled to pay terminal benefits within the provisions of the Collective Bargaining Agreement, within a specified period.
- d. The Directors of the Respondent be restrained from leaving the jurisdiction of the Court, without the authorization of the Court.
- e. The 2<sup>nd</sup> Respondent is ordered to withhold the deal pending hearing and determination of the Claim.
- f. Any other reliefs the Court may deem fit to grant.
- g. Costs of the Claim.

2. The prayers above are not clear. Interim prayers are mixed up with the substantive prayers. The Statement of Claim was accompanied by an Application in which the Claimant sought the following interim orders:-

- a. The on-going verbal redundancy be stopped pending hearing and determination of the Claim.
- b. That the handover of the Hotel Sheshe to owner of the Building be stopped pending hearing and determination of the Claim.
- c. The Respondents be directed within a specified period to pay Workers salaries from March 2013 to-date and other claims legally

The Application itself does not make the Claimant's pleadings are more illuminating. A second Application filed by the Claimant on 31<sup>st</sup> July 2013 sought to have the 1<sup>st</sup> Respondent compelled to deposit a sum of Kshs. 7,343,657 with the Labour Office as terminal benefits for the affected 42 Employees. Secondly, it sought to stop '*the Only Director in the Country Edmondo Buffa from leaving the Country until the [order for deposit of the money above] is fully complied with.*' This last prayer prompted the entry of the Interested Party into the fray.

3. The Interested Party Edmondo Buffa was joined to the proceedings with the Consent of the Parties, upon filing an Application to be added as an Interested Party, on 20<sup>th</sup> August 2013. His interest is explained in his Supporting Affidavit sworn on 19<sup>th</sup> August 2013, and Statement of Response filed on 26<sup>th</sup> May 2014. He sought to have the Claimant's prayer to have him restrained from leaving the Court's jurisdiction as a Director, expunged from the record. Mr. Buffa was also cross-examined by the Claimant's Representative on his Supporting Affidavit, on the 22<sup>nd</sup> August 2013. He states he was allotted 10 shares out of 1000 shares in Tabora, by his friends and Directors of Tabora, Renato Circosta and Marta Matteini. He was initially made a Director, but because there was failure of consideration in the transaction, he was compelled to resign as a Director, but retained his tiny shareholding in Tabora.

4. Cross-examined about his Affidavit, the Interested Party testified he was a Director of Tabora in 2010. He was asked by the 1<sup>st</sup> Respondent's Directors to inquire about certain payments, including the Workers' salaries. He engaged Auditors who gave him a Report. He was not a Director, but a Friend of the Directors. He agreed to have communicated to a Mr. Hussein from Italy, with respect to the 1<sup>st</sup> Respondent's Debts, including Staff Dues. Buffa was sent Money by the 1<sup>st</sup> Respondent through the Bank to pay to the Employees. He paid the Employees their Dues for October, November and December 2011. Buffa resigned as a Director of the 1<sup>st</sup> Respondent in writing.

5. Redirected, Buffa testified he paid Kshs. 435,433.59 to the Account of the 1<sup>st</sup> Respondent. The money was sent to him from Italy. It was to be paid to each Employee, but the Claimant and a Mr. Mustaffa, one of the Employees of the 1<sup>st</sup> Respondent, refused the payments. They claimed they wanted to be paid in full. Certificates of service and termination letters were prepared. Terminal benefits were tabulated. He resigned from the Directorship of the 1<sup>st</sup> Respondent, a fact confirmed by official search carried out at the Registrar of Companies in 2013.

6. The first Trial Judge who has since been transferred to Nakuru undertook to make a Ruling on Mr. Buffa confinement to the Court's jurisdiction and presumably on the deposit of the terminal dues with the Labour Office, on the 29<sup>th</sup> August 2013. The Parties were in the meantime referred to the County Labour Office and attempt agreement on the computation of terminal dues. On 6<sup>th</sup> December 2013, the Court advised its Ruling would be given with the main decision, and fixed the main hearing for 27<sup>th</sup> March 2014.

7. The County Labour Officer met the Hotel Manager and the Claimant Union on 11<sup>th</sup> September 2013 and 26<sup>th</sup> September 2013. The Parties came up with terminal dues for 47 Employees, calculated at Kshs. 7,753,598, a figure alleged to have been arrived at consensually.

8. The Claimant prosecuted its Claim through the oral submissions of its Industrial Relations Officer John Simiyu, and evidence of its Disputes Officer Mr. Patrick Yasisi on 23<sup>rd</sup> June 2014. Mr. Yasisi testified upon the request of the Interested Party. The Respondents were unrepresented and gave no evidence, while the Interested Party, alleging to be old and sickly, adopted the evidence already given by him, on the Notice of Motion. The Interested Party requested to have the Labour Office Mr. Joseph Nyaga present himself in Court on 27<sup>th</sup> November 2014, when the Labour Officer was examined on his Report by the Parties' Representatives.

9. Mr. Simuyu asked the Court to adopt the Report of the County Labour Office. The Report was arrived at after meeting the Employer and the Trade Union. It is based on the employment records inspected by the Labour Office. The Directors of the Respondent should be liable for the satisfaction of Employees' dues. Mr. Buffa was authorized to make payments. He is the only known Director of the 1<sup>st</sup> Respondent. He paid Employees part of their dues, comprising service charge up to June 2012. He oversaw the business as shown in his appointment of the Auditors.

10. Mr. Yasisi visited the 1<sup>st</sup> Respondent Hotel with the County Labour Officers, on 11<sup>th</sup> September 2013. Three Labour Officers, Mr. Nyaga, Mr. Katana and Mrs. Ronga accompanied Mr. Yasisi. They were met by Hotel Manager Mr. Mustaffa. The Hotel was closed. There were no Guests. There were 2 Security Guards at the premises. Guests ceased to visit the Hotel in March 2013.

11. There were 43 Employees on record in March 2013. In early March, 2013, the Trade Union Officials had met Mr. Buffa. The Hotel was closed during the low season from April 2013. The Manager informed the Trade Union operations would resume on 15<sup>th</sup> May 2013, March 2013 salaries were not paid. The Grievants were still in the 1<sup>st</sup> Respondent's pay roll. Previously, Employees were paid while on placed on leave in the low seasons. There were no Casual Employees. The Parties had a CBA concluded after discussions between them. The computations carried out with the aid of the Labour Office did not have statutory deductions. The Directors of the Tabora were not represented at the meeting on 11<sup>th</sup> September 2013. The Labour Officers examined the employment records at the workplace. Tabulations were based on these records. The terminal dues were to be subjected to statutory deductions.

12. The County Labour Officer Mr. Nyaga confirmed, on being examined by the Advocate for Mr. Buffa, that he attended the meeting between the Hotel Manager and the Claimant on 11<sup>th</sup> September 2013. The Manager Mr. Mustaffa Omar represented the Hotel. Mr. Nyaga was not able to say if the Hotel closed in March 2013, or that Employees worked for only 7 days in March 2013. The computations were by consensus. He did not know whether Unionisable Employees were only 30, while his Report comprised 47 Employees. There was no need for the Labour Officer to examine if some Employees resigned voluntarily. He did not meet the Hotel Directors. There was no reason to find out if the Employees were Union Members. His names were among those given to the Labour Officers. He was not able to say if Employees listed as Number 44 to Number 47 were in employment as of 1<sup>st</sup> March 2013. Employees 1 to 9 salaries for March were not captured in the records. Mr. Nyaga could not say if this was because they worked for the whole of March, while others worked on select days. He did not know which Employees were or were not Union Members. This was not an issue under reference, and he did not wish to go beyond his mandate. He did not know if N.S.S.F and N.H.I.F deductions were made and remitted;

whether the Trade Union made any demands upon the Directors; or whether the Employees paid the Trade Union dues directly or through the Check off.

13. Examined by the Claimant's Representative, Mr. Nyaga stated he visited the Hotel pursuant to the orders of the Court. He asked for the person in charge. The Manager responded. Mr. Nyaga did not have the contact of the Interested Party. The Manager availed all the employment records to the Labour Officer. The Parties agreed on what was payable. There was no need of going into the other issues. There 2 groups of Employees: those who were still in employment by March 2013; and those who had left. There were no complaints lodged by the Parties about the Report. If there was an Audited Report prepared by the Respondents, it should have been shown to the Labour Officer on his visit.

14. The Claimant reiterates in the Final Arguments that the Respondent was free to close its business, but went about the resultant redundancy contrary to Section 40 of the Employment Act 2007 and Clause 28 of the CBA. The Report of the Labour Office followed an order made by the Court, involved all the Parties and should be endorsed by the Court. The Interested Party was in Court when the Court made the order. The Claimant urges the Court to Award in favour of the Grievants, based on the Report of the Labour Office.

15. The Respondent submits that the Claimant Union has no locus standi to instigate the Claim, because the Grievants were not shown to be fully paid-up Members of the Claimant Union. The CBA attached to the Claim is doubtful because it was registered at the Industrial Court in Nairobi, while there is an Industrial Court at Mombasa; the signatures on the document are different; and the Directors of Tabora Enterprises did not authorize anyone to execute the CBA. The dispute was presented to the Court prematurely as no Conciliator was appointed. Employees' positions were not declared redundant; the Respondent merely closed down its business due to low season. The date of closure of the Hotel was variously given as March, April, May, and June 2013. The Respondent submits the correct date should be March 2013. Mr. Omar Mustaffa was an Employee of the Respondents, with no authority to speak for the Respondents. It is not clear how many Employees worked at the Hotel. The Statement of Claim indicates there were 42 Employees; the Labour Officer's Report states they were 47; while the Interested Party holds there were only 19 Unionisable Employees as of March 2013. The Labour Officer was not able to explain how the computations were worked. Not all Parties were represented at the meeting. The Respondent paid N.S.S.F dues for its Employees; they would not be entitled to service pay.

*The Court Finds:-*

16. There was the undertaking by the first Trial Judge, to give a ruling on the application seeking to have an order confining Mr. Buffa to jurisdiction of the Court, and on deposit of the terminal dues with the Labour Office. The Interested Party asked the Court to strike out the prayer for confinement. These prayers are spent. They relate to provisional measures, which the Parties wished to have awaiting trial. The trial is concluded and no purpose would be served, in having money deposited, Mr. Buffa confined, or the prayer to have order 'c' of the Notice of Motion dated 29<sup>th</sup> July 2013 expunged.

17. On substantive aspects of this dispute, the Interested Party went at length to show that he is not a Director of Tabora Enterprises. This was not necessary; if he was nothing in Tabora, he may as well have kept off the proceedings altogether.

18. His participation in the proceedings has enabled the Court to find and hold that he was a former Director who resigned after the transaction between him and his fellow Directors and Friends Renato and Marta did not fully fall through. Buffa retained shares in the Enterprise, but recanted Directorship. His being not a Director however, did not remove him from his role as an Employer. The issue is not whether Buffa was Director at the material time; the issue is whether he was an Employer.

19. Section 2 of the Employment Act 2007, as well as the Interpretive Sections of the other Labour Statutes, describe an Employer to include: *any person, public body, firm, corporation, or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager, or factor of such person, public body, firm, corporation or company.*

20. Mr. Buffa retained his position as a minority shareholder, but also remained as an Employer. He was the person in his own evidence, who was asked by the absent Directors to inquire about the Respondent's debts, including debts owing to Employees; he was the person who commissioned Auditors for the Respondents; he communicated with Mr. Hussein from Italy about the Respondents' debts; he was sent money by Respondents through the Bank to pay Employees their salaries; he oversaw the Respondent's business; and although coming in these proceedings as an Interested Party, has basically made the Response for the Respondents, the Respondents having stayed away from the proceedings. The Interested Party was an Employer within the definition of the law. It is irrelevant whether he was a Director or Shareholder of the Company.

21. The Parties were ordered by the Court to meet at the Respondent Hotel and with the aid of the Labour Office, agree on the computation of the redundancy dues owing to the Grievants. The order was made in the presence of the Interested Party. There entire Court Labour Office Mombasa, comprising Mr. Nyaga, Mr. Katana, and Mrs. Ronga accompanied the Trade Union Representatives, and were joined by Hotel Manager Mr. Omar Mustaffa at the meeting on 11<sup>th</sup> September 2013. The Labour Office examined the employment records availed by the Employer, and came up with a list of Staff Final Dues, filed in Court on 26<sup>th</sup> September 2013.

This Report was consensual.

22. With due respect to the Interested Party the dispute herein was never about the Membership of the Employees to the Claimant Union. The validity of the CBA was not in issue. CBA registration is ordinarily centralized and done at Nairobi. There is wisdom in decentralization, but this again is a policy issue, not an issue in dispute in this Cause. The Membership of the Employees to the Claimant Union and the validity of the CBA have never been challenged by the Respondents of the Interested Party during the proceedings or conciliation process. These issues raised by the Interested Party particularly in his Final Arguments were dilatory and aimed at obfuscation.

23. The assertion that the Claim was brought prematurely has no merit. The record indicates it was brought under certificate of urgency, certified as urgent by the Court, which cannot be the same thing as prematurity. The submission by the Respondent that it did not declare redundancies, but merely closed down its business because of the low season, is similarly without merit. There was no indication to the Employees that they were to resume their roles. They lost their jobs involuntarily, through the instigation of their Employer, on the basis of economic justification. Redundancy is defined under Section 2 of the Employment Act 2007:

*“the loss of employment, occupation, job or career by involuntary means, through no fault of the Employee, involving termination of the employment at the initiative of the Employer, where the services of an Employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.”*

24. The Respondents closed down business because of low season in March 2013. This was stated by the Parties to be usual practice in the Industry, with reopening intended for July 2013. The Respondents assertion that they merely closed down business in March 2013 because the season was low is not entirely incorrect; redundancy however is to be read in the failure by the Respondents, to have any intention or firm commitment to recall the Employees on reopening in July. There was no evidence even that the Respondents reopened in July. The loss of employment was involuntary, and permanent, dictated to by economic or operational reasons.

25. The date when termination was deemed to have occurred, and the amount of redundancy payments, were part of the items agreed upon by the Parties with the aid of the Labour Office. These are not matters the Interested Party can turn around and challenge at this hour. The Respondents themselves have not questioned the Report. All Parties were aware of the orders made by the Court to work out the details of the redundancy packages. They did so at the Respondents' Hotel.

26. The Interested Party has questioned the role of the Hotel Manager in representing the Employer at the

meeting with the other Social Partners. The Directors of the 1<sup>st</sup> Respondent remained elusive. In this dispute even the one time Director Mr. Buffa, the Interested Party herein, was less than willing to should accountability on the part of the business. It is strange that Mr. Buffa should question the validity of the Hotel Manager's to represent the Employer.

27. A Hotel Manager fits the description of an Employer under Section 2 of the Employment Act 2007. The person, who answered to the call by the Labour Officers when they visited the Hotel to implement the order of the Court, was Mr. Mustaffa Omar. He and Fabiano De Bei, General Manager of Sheshe Beach Resort, signed the Collective Bargaining Agreement concluded with the Claimant Union. Mustaffa Omar's was a man seized of the captancy of the Business, the face of the Employer, and whose actions on behalf of the Employer were binding on the Employer.

28. As for Mustaffa Omar's inclusion in the list of Employees due to receive redundancy payments from the Respondents, the Court is satisfied Mr. Omar should not have been on the list. He was representing the Employer, and should have negotiated his own package separately from that of the other Employees. There seems to have been another 4 names added to the final list contained in the Report of the Labour Office. The Claim was brought on behalf of 42 Grievants, who are named in the Affidavit of General Secretary Joannes Okotch in support of the Application filed on 31<sup>st</sup> July 2013. The addition of other names, including that of the Hotel Manager Mustaffa Omar, went beyond the scope of the Claim presented for the determination of this Court. The redundancy dues were worked in accordance with the specific CBA, covering a specific cadre of Employees. Although under Section 40 of the Employment Act 2007, no Employee shall be placed at a disadvantage for not being a Member of the Union, a Manager cannot sneak his name into a dispute involving Employees, a dispute to which he was not a Party to, in the hope of benefitting alongside the Employees on whose behalf the Claim is made. If the additional 5 Employees have a grievance against their former Employer, they should be in a position to present their own Claims. The Court recognizes 42, not 47 Grievants.

IT IS ORDERED:-

- a. *The Respondents shall pay to the 42 Grievants redundancy benefits as computed in the Report filed in Court by the County Labour Office on 27<sup>th</sup> September 2013.*
- b. *The 5 names added to that list from the original list of 42 Grievants are expunged from the list.*
- c. *The redundancy benefits shall be paid within 30 days of the delivery of this Award.*

**Dated and delivered at Mombasa this 20th day of March 2015**

**James Rika**

**Judge**