REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

ELRC CAUSE NO. 265 OF 2013

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

VERSUS

1. WELL-COME INN HOTELS T/A MALINDI INVESTMENTS LTD

2. HERALD KAMPA……..….....RESPONDENTS

RULING

INTRODUCTION

The Respondents have raised Preliminary Objection (P.O) to the Claimants Suit and prayed for it to be dismissed or struck out on the following grounds:-

a) The Suit is time barred,

b) The Claimant lacks standing to bring the Suit, and

c) Wrongful or Misjoinder of the 2nd Respondent.

Background

The Claim was filed on 17.9.2013 by the Claimant Union on behalf of the 36 grievants seeking reinstatement to employment without loss of benefits or in the alternative payment of separation dues. The Suit also seeks for the refund of Kshs. 2million plus interests in respect of cooperative shares deducted from their salary but never remitted to their SACCO. The Suit was a culmination of Labour dispute lodged with the Ministry of Labour under the repealed Trade Disputes Act (TDA) on 12.6.2002 which continued until 5.8.2013 when the Minister referred the dispute to this Court. The dispute was finally registered in this Court on 20.8.2013 and served upon the Respondent who filed her defence and the Notice of Preliminary Objection herein.

The dispute revolves around mass transfer of the grievants from the Respondent's Lawfords Beach Club in Malindi to Diani Sea Resort and Lodge in Kwale, South Coast in what the Claimants calls redundancy. The 1st Respondent however denies that she declared the grievants redundant and contends that she only transferred them from one of her hotels to another. The 2nd Respondent however has denied being in any employment relationship with the grievants and avers that he was only the managing Director of the 1st Respondent. The Respondents' P.O. was disposed of way of written submissions which were highlighted

on 10.6.2015.

RESPONDENTS' SUBMISSION

Miss Muyaa, Learned Counsel for the defence prosecuted the P.O. She submitted that there was misjoinder of parties to the Suit because the second Respondent is only a Director of the 1st Respondent and not the employer of the grievants. According to the Counsel, there was no contractual relationship between the 2nd Respondent and the grievants and/or the Claimant. She maintained that the 1st Respondent was a separate legal entity from its Directors and capable of being sued in its own name. The Counsel observed that the Claim has not pleaded that there existed any privity of contract between the 2nd Respondent and grievants or the Claimant. In addition the Counsel observed that there is no specific prayer in the Claim against the 2nd Respondent. Consequently, the Counsel has submitted that the 2nd Respondent is wrongfully enjoined in this Suit because there is no common question of law or fact that necessitates joinder of the 2nd Respondent as a defendant herein.

On the issue of locus standi, the Counsel submitted that the Claimant has no actionable cause of action against the Respondents and as such the Suit should be struck out. According to the Counsel, the parties to this Suit lacked any Recognition Agreement or Collective Bargaining Agreement (CBA) and such they had no legal or contractual nexus between them to warrant filing of this Suit in the Claimant's own name on account of the 1st Respondent's employees. The Counsel cited section 2 of the TDA to urge that it is only the Recognition Agreement which gives recognition to a Trade Union as the body entitled to represent the interests of those employees who are its members and who are specified in the agreement. Without such Recognition Agreement, the Counsel submitted that the Claimant lacks standing to bring this Suit. She cited ***Industrial Court No. 31 of 2013 Communication Workers Union vs. Safaricom Ltd [2014] eKLR*** and ***Industrial Court NO. 1435 of 2012 Transport Workers' Union (K) vs. Ideal Logistics Ltd [2012] eKLR*** both where the Court differently constituted held that without any Recognition Agreement, a Trade Union lacks **Locus Standi** to institute claims against the employer to agitate for rights of employees who are its members.

Lastly, the Counsel urged that the Suit should be struck out for being time barred. According to the Counsel the cause of action arose on 15.7.2001 and the Suit was filed on 17.9.2013, over 12 years span. She relied on section 4(1)(a) of the Limitation of Actions Act Cap 22 laws of Kenya, to prove that the life of any cause of action founded on contract was limited to 6 years. In a nutshell, Miss Muyaa submitted that the aforesaid 3 grounds of the P.O. extinguished the jurisdiction of this Court over the dispute before it.

CLAIMANT'S SUBMISSION

Mr. Simiyu represented the Claimant in opposing the P.O. He submitted that the defence Counsel's submissions were misconceived. On the issue of misjoinder, Mr. Simiyu submitted that section 2 of the Labour Relations Act (LRA) allowed an employee the option of suing the employer or his agent. In this case, Mr. Simiyu submitted that the Respondent was joined to the Suit after the Respondent closed down premises where the grievants were working. He maintained that no prejudice was occasioned to 2nd Respondent by the joinder.

As regards the issue of *Locus Standi*, Mr. Simiyu submitted that the grievants were members of the Claimant union after having exercised their constitutional right to individually join a Union. He maintained that an individual employee who joins a Union is entitled to be represented by his Union even before the employer has given recognition to the trade Union. He submitted that the individual right (minority right) exists independently from the Collective right after recognition. He relied on ***Industrial Court No. 826 of 2012 Kenya Shoe & Leather Workers Union vs. Falcon Tanners Ltd [2013] eKLR*** and ***Industrial Court No. 1330 of 2010 Kenya Guards and Allied Workers Union vs. Lavington Security Ltd [2013] eKLR*** where this Court differently constituted held that lack of Recognition Agreement does not vitiate the employee's right of representation in the present dispensation in view of the provisions of Article 41 of the Constitution which entitled an employee to join trade Union of his own

choice to agitate for his Labour rights.

Lastly, Mr. Simiyu submitted that the Suit herein is not time barred. He submitted that the case was lodged as informal dispute before the Labour office and the process continued until 10.4.2012 when the Labour Minister issued a Certificate referring the Suit to the Industrial Court. The said Certificate was addressed to the judge of the said Court and it was accompanied by form F and the letter from the Chief Industrial Relations Officer. He relied on this Court's decision in ***I.C. NO. 98 of 2012 Kenya Hotels & Allied Workers Union vs. The Office Restaurant*** which was upheld by the Court of Appeal where it was ruled that time stopped running when informal dispute resolution mechanism under the TDA were commenced, thereby making it impossible for the Claim to become time barred.

ANALYSIS AND DETERMINATION

10. There is no dispute that the grievants were employed by the 1st Respondent at her Lawfords Beach Club, Malindi. There is also no dispute that the 2nd Respondent was the Managing Director of the 1st Respondent. There is also no dispute that the grievants were members of the Claimant. In addition, there is no dispute that there existed no Recognition Agreement or privity of contract of employment between the Claimant and the Respondents. Lastly, there is no dispute that before this proceedings were lodged herein, the parties had undergone informal dispute resolution before the Ministry of Labour within the Provisions of the TDA which culminated to the referral of the dispute to this Court on 5.8.2013. the issues for determination are:-

a) Whether the Suit is time barred.

b) Whether there is misjoinder of parties.

c) Whether the Claimant lacks standing to bring this Suit.

TIME BAR

12. The Court has given priority to this question because it goes to the jurisdiction of the Court. The Court's jurisdiction is only available in respect of causes of action which are not time barred. In this case, the defence has argued that the cause of action arose on 15.7.2001 while the Suit was filed on 17.9.2013 which was outside the 6 years period provided for under section 4(1)(a) of the Limitation of Actions Act. The Claimant however, contends that the Suit is properly before the Court by dint of the provisions of the TDA under which the parties had first gone for informal dispute resolution before the Labour Ministry. The Court has carefully considered both arguments and the pleadings filed. The Claimant reported an informal dispute to the Labour office on 12.6.2002 under the provisions of the TDA. The Respondents were notified of the informal dispute by the Labour office on 11.7.2002. When the deadline for the grievants to go on transfer ended on 15.7.2002, the police was allegedly called by the Respondent to remove the grievants from the Lawfords Beach Club and the Respondent dismissed all the grievants for gross misconduct, namely turning down a transfer.

13. The informal dispute proceedings continued from July 2002 until the Commissioner of Labour issued a Certificate dated 3.4.2012 that the machinery for voluntary settlement under TDA had been exhausted. The Minister then referred the dispute to this Court under section 14(a)(f) of the TDA vide a Form 'H' dated 10.4.2012 for determination of the issue of nonpayment of salaries and lock out of 36 employees between the Claimant Union and the Respondent herein. The said documents were dispatched to this Court by the Labour Ministry vide letter dated 5.8.2013. Thereafter the Court opened this file and issued summons to the Respondent on 20.8.2013 to attend Court on 26.8.2013.

13. The Court is satisfied that this Suit is a continuation of the proceedings which were commenced on 12.6.2002 under section 4 of the TDA. It is therefore not time barred under section 4 of the Limitation of Actions Act. In fact the Memorandum of Claim filed herein on 17.9.2013 was not necessary at all except for substantiating the issues in dispute. The Court of Appeal in **The Office Restaurant Case** cited by the Claimant upheld a decision of this Court where a similar P.O. was dismissed. The Court therefore

answers the first issue for determination in the negative.

MISJOINDER OF PARTIES

14. The Court has considered the submission by the defence that the 2nd Respondent is only a Director of the 1st Respondent and not the employer of the grievants. The Court has however been persuaded by the Claimant's submissions that an employer includes his agents and managers like the 2nd Respondent. This dispute is governed by the provisions of the Employment Act Cap 226 (repealed) Section 2 of which defined employer to mean:

> ***"….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".***

15. The foregoing definition is not ambiguous at all. It is clear that an Agent or Manager of a Company or even a Firm is equal to the actual Employer (Principal) when it comes to obligations created under an employment contract between an employee and the company or firm. The Court therefore, finds on a balance of probability that the 2nd Respondent is properly enjoined to this Suit in his capacity as Director or Managing Director of the 1st Respondent. He is not immune from the 1st Respondents' contractual obligation in these proceedings by dint of section 2 of the repealed Employment Act. There is therefore no misjoinder of parties in the Suit.

LOCUS STANDI

16. According to the Respondents, the parties herein had no Recognition Agreement and as such the Claimant remained a bystander to any industrial dispute between the grievants and the Respondents. The Claimant however has submitted that the grievants had individual right to join a Trade Union to represent them even before a recognition Agreement was executed by the employer. She cited section 80 of the Constitution (now repealed) as the basis of such minority right of the employees.

17. The Court agrees with the Claimant that under section 80 of the repealed Constitution, the right to join Trade Union by individual employees was guaranteed. The said right extended to the right of representation of the said individual by his Union in agitating for his right. The said right was recognized by the Labour Officer who entertained the informal dispute which culminated to this Suit.

18. It has not been denied that the Respondent had appreciated the representation of the unionized staff by the Claimant from the letters annexed to the pleadings that the Union had shop floor representatives at the work place including elected shop stewards and members of the Workers Committee. Such presence of the Union representation was so clear that the 1st Respondent's manager copied the letter extending the deadline for transfer of grievants from 3.7.2002 to 15.7.2002 to the Workers Committee. In addition the Respondents never objected to the informal proceedings before the Labour Officer on the ground of standing.

19. In view of the foregoing, the Court finds that the P.O. on ground standing is belated and it is an afterthought. As observed herein above, this dispute is only a continuation of the informal dispute which was referred to the Court for determination on the merits. The parties to the dispute and the issues for determination are clearly stated on Form 'H' signed by the Labour Minister dated 10.4.2012. The parties are the **"Claimant and 1st Respondent"** while the issues for determination are **"nonpayment of salaries and Lock Out of 36 employees"**. There is no doubt from the correspondences exhibited that the dispute raises a common question of fact and law to all the grievants in nature involving one question of transfer and lock out of all the grievants. The Court has no discretion to reject the matter once it is referred to it under section 14 the TDA. If that discretion was available, the statute would expressly have provided for it.

20. The Court has tremendous respect to the cited persuasive decisions which suggested that without a

Recognition Agreement, a Trade Union has no standing to sue on behalf of its members. Such view may not have considered the Principle of Third Party standing or the Organizational standing which is vested in the trade Unions by virtues of their foundation essentially as representative bodies by their respective Constitutions. In this Court's view a Recognition Agreement is a Voluntary document which cannot be the only basis upon which a Union can derive standing to represent its members. It is therefore not proper to summarily dismiss this Suit on ground of lack of standing without considering its merits. It has travelled such a long journey without any objections from the Respondents that it is only fair that it should be determined on the merits. The answer to the third issue for determination is therefore in the negative.

DISPOSITION

21. For the reasons stated above, the P.O. by the defence is dismissed with costs.

It is so ordered.

Dated, Signed and delivered this 24th July 2015.

O. N. MAKAU

Judge