



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT MOMBASA**

**CAUSE NO. 380 OF 2013**

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

**VERSUS**

**PANGONI BEACH RESORT .....RESPONDENT**

**J U D G M E N T**

**INTRODUCTION**

The claimant sued the respondent seeking orders to restrain the respondent from declaring her workers redundant or victimizing them on ground of their union affiliation. The suit also seeks for an order to compel the respondent to sign a recognition agreement with the claimant in compliance with Section 48 and 54 of the Labour Relations Act (LRA).

The respondent has denied the alleged victimization or any intended redundancy on ground of the workers union affiliation. In addition the respondent has contended that she already has recognized a rival union [KUDHEIHA] with whom they have signed a CBA under the umbrella of Employers Association called the Kenya Hoteliers and Caterers Association wherein the respondent is a member. The CBA was signed on 22/6/2012 for the period between 1/7/2012 to 30/6/2014.

As regards recruitment of a simple majority of her workers by the claimant, the respondent denies the allegation and maintains that she has never received any notification of the said recruitment or any check off forms. The suit was disposed by way of written submissions.

**ANALYSIS AND DETERMINATION**

After careful perusal and consideration of the pleadings and the submissions filed, the following issues arose for determination:

1. **Whether the claimant has recruited a simple majority of respondents unionisable staff.**
2. **Whether the respondent and her unionisable staff have freedom of association**
3. **Whether the respondent is contemplating declaring her unionisable staff redundant or victimizing them on ground of union affiliation.**
4. **Whether the orders sought should issue.**

**Simple majority**

The claimant has annexed to the claim a list of the recruited members from the respondents staff. The

names are also in the list of staff members filed by the respondent. The respondent has not denied that the persons in the list filed by the claimant were her employee on 8/2/2013 when they signed the check off forms. The court therefore treats them as lawful employees of the respondent as at the date they were recruited and also as at the time of filing the suit.

The list filed by the respondent on 9/12/2013 is for 60 staff members including 27 in the management position. That leaves only 42 unionisable staff which is below the 57 recruited by the claimant on 8/2/2013. The excess must have left work for one reason or another after recruitment to the union.

The foregoing figures prove that the claimant recruited more than a simple majority of the unionisable workforce in the respondent's establishment. She has therefore met the requirement for recognition under Section 54 of the LRA.

### **Right of Association**

Section 4 (1) (b) and (c) of the LRA gives every employee the right to join or leave a trade union. Likewise Section 6(1) (b) gives every employer the right to join an employer's organization or a federation of employers organization. The foregoing provisions of the law demonstrates that each party to employment contractss has freedom of association in industrial relations and cannot be compelled by the other to join or leave the trade union or employers organization of ones choice.

The question that arises is whether the choice of one party to leave his trade union or employers organization should automatically force the other party to also leave.

In the present case, the grievants have voluntarily allegedly left KUDHEIHA to join the claimant. KUDHEIHA has a CBA with the employers organization in the hotel industry where the respondent is a member. Should the respondent be compelled to leave her organization to engage the claimant alone in negotiating another CBA. The court is of the view that doing so would be a violation of the respondent's right. The reason for the above view is that whereas the grievants are leaving their original union voluntarily, the respondent would not be leaving voluntarily.

The position could have been different if the grievants were not voluntarily leaving their original union for example in a case where the union is wound up or has changed its constitution so as to become incapable of representing the workers in the industry. That is not the position in the present case as the grievants decision was necessitated by the existence of an alternative trade union in the industry.

The court will therefore uphold the respondents' right to continue her membership with employers organization in the industry. The reason for the foregoing is because the respondent has no alternative employer organization which recognizes the claimant.

### **Redundancy and Victimization**

No evidence was tendered to support the alleged victimization and the intended redundancy to the workers who have joined the claimant. The court will therefore not spend any effort analyzing that issue.

### **Which orders to make**

In view of the foregoing the prayer for injunction against victimization and redundancy is dismissed for lack of evidence. Likewise the prayer for recognition is dismissed because it is tantamount to compelling the respondent to leave her employers organization against her wish to negotiate CBA with claimant alone without the benefit of representation by her organization. The order would not only violate Section 6 of the LRA but also Article 41(3) of the constitution.

Consequently the grievants will have to chose between continuing membership in KUDHEIHA which adequately represents the workers in the industry or join claimant who does not represent workers employed by the employers in the industry. I say so because, the defence has demonstrated that

KUDHEIHA has Recognition Agreement and CBA with the Kenya Association of Hoteliers and Caterers while the claimant does not.

**DISPOSITION**

The suit is dismissed with no order as to costs.

**Dated, Signed and delivered this 11<sup>th</sup> July 2014**

**O. N. Makau**

**Judge**