



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 405 OF 2012

[Consolidated with Cause Numbers 402 of 2011, 403 of 2011, 404 of 2011, 627 of 2012 and 2171 of 2012]

BETWEEN

1. PAUL SEKI NZAU
2. MAKOLA MUTISYA
3. NGUMO SAMUEL KARANJA
4. KARUGA FREDRICK
5. JAPHETH KIMATU MUSYOKA
6. JOHN O. ISENGE
7. EVANS OMBACHI BOSIRE
8. JAMES KARANJA KIMANI
9. BERNARD AURA
10. PATRICK BERNARD GITHINJI
11. RASHID KAMBI CHALE
12. ROSELINE OKUNGU
13. RITA AKOTH AMBUSA
14. EVERLYN K. OMWENGA
15. OSCAR KENNEDY ORONDO
16. PHILLIP W. HOWARD
17. LUCY NKATHA
18. WOLLIAM C. RUTO
19. MUSYOKA STEPHEN
20. ARTHUR KISAMBO BWOYELE
21. ROSEMARY MUENI MUSAU
22. JACKSON KILUNGU
23. HEZEKIAH AMUNAVI KIRETI
24. NGUSU ONESMUS MUTUA
25. OMARI PETER S
26. DAVID OTIENO J
27. MUNGE JOSHUA KIMEU
28. JENNIFER WAMBUI MBUTHIA

VERSUS

LAICO

REGENCY HOTEL
RESPONDENT

Rika J

CC. Edward Kidemi

Mr. Mageto instructed by M’Njau & Mageto Advocates for the Claimants

Mr. Masese instructed by the Federation of Kenya Employers for the Respondent

ISSUE IN DISPUTE: REDUNDANCY PAYMENTS

AWARD

1. The Hotel previously known as the Grand Regency in the Central Business District of Nairobi, was placed under receivership by the Central Bank of Kenya. It was purchased by an Investor in 2008, becoming the Laico Regency Hotel, named as the Respondent herein.
2. The Respondent reorganized its new business on acquisition. This necessitated the declaration of certain employment positions existing under the Grand Regency, redundant. At the time of the transfer of business, there was in place a Collective Bargaining Agreement, concluded between, the Trade Union then representing the hotel industry, known as Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers Union [acronym KUDHEIHA] and the Grand Regency Hotel.
3. There was an agreement concluded by the Parties to the purchase agreement, that the Employees of the Grand Regency would exit the workplace on redundancy, and terminal benefits worked out between the Respondent and KUDHEIHA. This agreement was signed on 4th July 2008.
4. The terminal benefits were computed and paid out as agreed. There was a change in the representation of Unionisable Employees at the Hotel, with the KUDHEIHA, ushered out in favour of the Kenya Hotels and Allied Workers Union [KHAWU]. The new Trade Union thought redundancy was flawed. It filed a Claim. In Industrial Court Cause Number 109 [N] of 2008, KHAWU claimed that the declaration of redundancy was unlawful, alleging that the Employees had been assured there would be continuity of service. The Court gave its Award dated 24th June 2008. It found the redundancy to have been lawful; the Employees had been paid their terminal benefits through their previous Trade Union KUDHEIHA; and were not therefore entitled to further benefits.
5. The Claimants filed a series of different Claims against the Respondent after this. They all seek from the Respondent gratuity and damages, based on the same termination that followed the transfer of business.
6. The Claims were consolidated, and evidence for the Claimants given on 15th November 2012, by the 15th Claimant. The Respondent did not call any Witness. Parties confirmed the filing of their Closing Submissions on 21st March 2014, and were informed the Award would be delivered on 16th June 2014. The Court, regrettably, did not sit on this date and was compelled to reschedule delivery of the Award to today.
7. The 15th Claimant, Oscar Kennedy Orondo’s evidence, was brief. He stated that the entire Employees’ dues were paid, except for the gratuity. It was the policy of the Hotel to pay gratuity. Gratuity was given under the CBA concluded between the Grand Regency and KUDHEIHA. Secondly, he was not, like his Colleagues, compensated for loss of employment. The Employees therefore wish the Court to order that they are paid gratuity, and 12 months’ gross salary each, for loss of employment.

8. He agreed on cross-examination that the CBA applied to his contract. Trade Union dues were deducted from his salary and paid to the Trade Union. The Employer did not give reasons for the redundancy. Almost 200 Employees were affected. He did not know when business ownership was transferred. He was not aware of the previous case filed by KHAWU. Gratuity is payable under the relevant CBA.

9. The Respondent's main ground in answering to this Claim, is that the Claim is *res judicata*, same issues and parties having been involved in the Industrial Court Cause Number 109 [N] of 2008, mentioned at paragraph 4 above. No terminal benefits are outstanding. No compensation is payable.

The Court Finds and Awards:-

10. The Claimants are former Employees of the Grand Regency Hotel. They were Unionisable Employees, and their terms and conditions of employment, subject to the Collective Bargaining Agreement, at the time in place, concluded between KUDHEIHA and the Grand Regency.

11. They were represented by KUDHEIHA, in the agreement that led to the declaration of redundancy in 2008. All the terms of termination of existing contracts of employment, through redundancy, were discussed and agreed. All the rights and obligations of the Employer and the Employees were discussed and collectively agreed, on transfer of business. Subsequently, the agreement was acted upon, and terminal benefits paid and receipt acknowledged.

12. Any lingering doubt on the demarcation of these rights and obligations was resolved in Industrial Court Cause Number 109[N] of 2008. This Claim was filed by the Claimants' successor Trade Union. The issue was about the lawfulness of the redundancy. The Court was persuaded redundancy was lawful, and all terminal benefits were paid. The matter should have rested there.

13. Compensation for loss of employment is granted in cases where termination is deemed unfair. The termination in this case was consensual. The reason for termination was redundancy, occasioned by transfer of business to new investors. The decision was arrived at fairly, through the consultations which involved the Respondent, the Claimants' Trade Union and the Vendor Central Bank of Kenya. There can be no compensation for loss of employment, in a termination which is based on fair and valid reason, and which is carried out consensually.

14. KUDHEIHA represented the Claimants fully in the consultations leading to the agreement on redundancy. The terms of agreement took into account all the terms of separation captured in the CBA. KUDHEIHA certainly knew those terms better than the Unionisable Employees would know. It authored the CBA jointly with the Employer, and compromised the right of individual Employees to agitate for further benefits under the CBA, upon its agreement with the Employer and the Central Bank on the redundancy. Being the recognized Trade Union, KUDHEIHA had the right of sole collective bargaining agent, and the Employees cannot seek to exact more from the Employer, than they received through the sole collective bargaining agent.

15. In any event the successor Trade Union did not argue that the Claimants were denied gratuity and compensation, when the dispute was taken before the Court in Cause Number 109 [N] of 2008; the argument there, was that the Employees were entitled to continuity of employment. There was no claim for gratuity or compensation for loss of employment. If there was a provision in the CBA for payment of gratuity, in addition to the payment of severance pay which was availed to the Claimants, it was for KUDHEIHA to ensure its inclusion in the redundancy agreement. And if KUDHEIHA failed to do so, there was an opportunity for KHAWU to pursue gratuity and compensation under Cause 109 (N) of 2008. The Employees have no ground to return to Court and say their Trade Unions did not make full representations.

16. There is an overabundance of merit in the Respondent's reply that the Claim is *res judicata*. An Award was rendered in favour of the Respondent in Cause Number 109[N] of 2008. The present claims are precluded. The same issue of unfair and unlawful redundancy was raised in the former Claim. Gratuity and compensation could have been pleaded in the former Claim.

17. *Res Judicata* is based on three elements.

- a. There must have been prior litigation in which identical claims, as raised in the second litigation, were raised or could have been raised. Claims are deemed identical if they share a common nucleus of operative facts. The prior litigation here was Cause Number 109 [N] of 2008. Identical claims were made in which the Court was prayed to find the redundancy unfair and unlawful. The two litigations are based on a common nucleus of operative facts, revolving around the agreement on redundancy following the transfer of business.
- b. Parties in the second litigation must be identical in some manner to the Parties in the original litigation, or be in privity with the Parties in the original litigation. The Laico Regency was the Respondent in the original litigation and is the Respondent in the present one. The Claimant in the previous litigation was a Trade Union KHAWU representing the Unionisable Employees subject matter of the redundancy agreement. The Claimants in the current proceedings are the Employees who were represented by KHAWU in the first Claim. It is futile for the Claimants to posit that they were not aware of the first Claim. They were represented by their Trade Union, and were in privity with their Trade Union KHAWU. In fact, the 7th Claimant in the present Claim, Evans Ombachi Bosire, gave evidence on behalf of the other Employees in Cause Number 109 (N) of 2008.
- c. Lastly, there must be in place a final decision made on merits in the original Claim. The Award in Cause Number 109 [N] of 2008 was such a decision. It was not a decision made on technicality, but was arrived at, upon a full assessment of the merits.

The Court is satisfied that this Claim is *res judicata*. This principle bars re-litigation of claims, as well as litigation of claims, which could have been litigated in the first Claim. IT IS ORDERED:-

[a] The consolidated Claims are dismissed in their entirety.

[b] No order on the costs

Dated and delivered at Nairobi this 8th day of July 2014

James Rika

Judge