



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**

**CAUSE NO. 66 OF 2013**

**(Formerly Nairobi Cause No. 2559 of 2012)**

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS, HOSPITALS  
AND ALLIED WORKERS.....CLAIMANT**

**-VERSUS-**

**MERICA HOTEL LIMITED.....RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday 19<sup>th</sup> July, 2013)**

**JUDGMENT**

The claimant filed the memorandum of claim on 24.12.2012 praying that the honourable court orders the respondent to withdraw all letters of termination for 9 employees to continue with their employment in order to assist themselves and their families who may suffer after the termination of the employment of the 9 employees. On 22.04.2013, the claimant filed the supplementary memorandum of claim and made prayers for:

- a. **a declaration that the redundancy is unlawful and all the employees declared redundant be reinstated without loss of benefits, positions or status;**
- b. **the respondent be compelled to comply with the provisions of the collective bargaining agreement (CBA) between the parties for its period;**
- c. **the claimant's members be given salary increment for the period of the CBA;**
- d. **in addition to or in alternative to the foregoing, the claimant seeks that the grievants be paid their terminal benefits including:**
  - i. **notice as per individual number of years served,**
  - ii. **severance pay at sixteen (16) days for every year worked,**
  - iii. **twelve months salary for unlawful loss of employment,**
  - iv. **special damages,**
  - v. **underpayment for years worked,**
  - vi. **leave travel allowance not paid for years worked,**
  - vii. **pending off-days,**
  - viii. **pending leave days,**
  - ix. **underpayment of service charge of 40% per month for period worked,**
  - x. **unpaid house allowance for the period worked;**

- e. **a declaration that the contract letters are unlawful and the employees be given employment letters as provided for under the CBA;**
- f. **the tabulation of the amount the court orders as due be supervised by the County Labour Officer at the Nakuru;**
- g. **the parties to sign a recognition agreement and conclude a CBA within 30 days;**
- h. **the court to make other further and better relief as the court may deem fit to grant; and**
- i. **costs and interest at court rate be provided for by the respondent.**

The respondent filed on 27.12.2012 the replying affidavit of Fiona Avinash Wanjiku and attached exhibits and a document headed the memorandum of response filed on 29.05.2013 and in its body being an affidavit by Godrick Authur Ithur said to be sworn on 29.05.2013. The respondent also filed the notice of preliminary objection on 29.05.2013 stating that the respondent is not a proper or necessary party to the suit; the suit does not raise any cause of action or a reasonable cause of action; and the claimant could not file a supplementary memorandum of claim that has been declared by the court to be improperly on record, incompetent and bad in law.

The case was heard on 27.06.2013. The claimant decided not to call any witness and the respondent called a witness (RW) Godrick Authur Ithur, the respondent's Human Resource Manager effective April, 2013. RW's evidence was as follows:

1. The respondent is engaged in hotel business and employs employees on seasonal basis and on fixed term contracts taking into account the work available. Workers may also be employed by the respondent on casual and permanent terms.
2. The grievants in this case were employed on fixed term contracts for three or six months respectively as per relevant letters of the contract. The contracts could be renewed or terminated depending on availability of work.
3. If the contract is to be renewed, the respondent discusses with the concerned employee and is renewed. If it is not to be renewed, the respondent gives a few days notice that it will not be renewed.
4. In the instant case, non-renewal notices were issued as a good practice but the contract did not provide for issuance of such notices.
5. The respondent was a member of the Union of Kenya Hotelkeepers and Caterers Association being an association of employers in the hotel industry. The respondent became a member of the association effective a date the witness did not know. The last renewal of membership was in early 2011 running up to end of 2012. In 2012, the respondent did not renew the membership. The witness stated the membership was useful and the respondent was in the process of renewing it.
6. The witness confirmed that the respondent's unionisable staffs were members of the claimant.
7. The parties concluded the agreement on 13.09.2012 being appendix 5 on the supplementary memorandum of claim and the agreement confirmed that the parties were in a recognition agreement. Appendix 6 on the memorandum being the letter by the respondent dated 3.12.2012 also referred to respondent's withdrawal from the association but effective date of withdrawal was not stated.
8. The notifications for expiry of the contract being appendix 2 on the memorandum of claim were not copied to the claimant because the grievants knew that their contracts would or would not be renewed upon lapsing.
9. The CBA was binding for the period of the agreement and the respondent's withdrawal from the association did not render the CBA inapplicable.

The claimant's submissions were filed on 2.07.2013 and the respondent's on 10.07.2013. The court has considered the pleadings, the evidence and the submissions and makes the following findings on the issues in dispute:

1. The first issue in dispute is whether the CBA is binding upon the respondent. The evidence by RW shows that the respondent was a member of the association for the employers in the hotel industry at all material times. The procedure the respondent was required to comply with to cease membership of the association remains unknown because the association's constitution was never on record to shed light on the membership provisions. There was no material on record to show that the respondent had ceased to be a member of the association and the court finds that the respondent being a member of the association was bound by the CBA. Section 54(5) of the Labour Relations Act, 2007 provides that an employer, group of employers' or association of employers may apply to the National Labour Board to terminate or revoke a recognition agreement and the court finds that the recognition agreement in the present case was never revoked or terminated as envisaged in the section. Further, section 59 (2) of the Act provides that a collective agreement continues to bind parties to the agreement at the time of the commencement including members who may resign from the trade union or the employers' association. Accordingly, even if the respondent showed it had resigned from the union, the CBA that came into force at the time the respondent was a member of the association, as is the case in this matter, would continue to bind the respondent.
2. The next issue is whether the respondent terminated the grievants' contracts of employment. The respondent submitted that the contracts lapsed by effluxion of time. It was submitted that the respondent did not possess any statutory, contractual or common law obligation to renew the contracts. The submissions for the claimant were that clause 19 of the CBA and regulation 18 (1) of the Regulation of Wages ( Hotel and Catering Trades) Order made under the Employment Act, Cap 226 being in force provide that no person in the hotel industry shall be employed on temporary or seasonal terms of employment for a period exceeding six months. Regulation 18(2) provides that an employee on temporary or seasonal terms of employment shall be deemed to have been converted to regular terms of employment on completion of six months' continuous service. Section 24 of the Interpretation and General Provisions Act, Cap. 2 provides as follows:

**“24. Where an Act or part of an Act is repealed, subsidiary legislation issued under or made in virtue thereof shall, unless a contrary intention appears, remain in force, so far as it is not inconsistent with the repealing Act, until it has been revoked or repealed by subsidiary legislation issued or made under the provisions of the repealing Act, and shall be deemed for all purposes to have been made thereunder.”**

Section 92 of the Employment Act, 2007 repealed the Employment Act, Cap. 226 but the subsidiary legislation under the repealed Act continued in place pursuant to section 24 of the Interpretation and General Provisions Act as cited above. Section 90 of the Employment Act, 2007 empowers the Minister to make the kind of provisions in the regulations as submitted for the claimant and in absence of any subsidiary legislation revoking or amending the cited regulations, the court finds that the cited regulations apply and the grievants were entitled to convert to regular terms of service upon serving for six continuous months.

3. The next issue for determination is whether the grievants are entitled to reinstatement. The court finds that the respondent's evidence that interviews were conducted to fill any vacancies following the lapsing of the grievants' contracts was not rebutted. The court finds that in such circumstances, reinstatement or re-engagement would occasion difficulties to implement and the court finds that reinstatement will not issue in this case.
4. The court finds that the claimant did not by evidence establish the underpayment, special damages, leave travel allowance, pending off-days, pending leave days, underpayment of service charge, unpaid house allowance, salary increment under the CBA and notice per individual number of years served. Accordingly, the claims shall fail especially that no specific submissions for the claims were made and no evidence was before the court to justify the claims and the prayers. The court further finds that the involvement of the County Labour Officer at Nakuru to compute the dues was misconceived as the claimant was required to discharge that burden to establish the justification of the prayers and claims as made in court to enable the court make appropriate favourable orders as was desired and prayed for.

5. As the court has found that the parties were in valid recognition and collective agreement at all material times, the court finds that the claimant is not entitled to the order that the parties should conclude the same. In any event, if the relationship was not in existence, then the parties would have to satisfy relevant statutory provisions to conclude the recognition and collective agreement. The issue of satisfaction of the statutory requirements was not before the court in this matter and the prayer shall fail.
6. The court finds that the claimant is entitled to the order that the respondent complies with the recognition and collective agreement binding the parties.
7. The court has considered the individual fixed term contracts and considered the conversion to regular terms of service which would entitle the grievants to fair termination procedures under section 41 of the Employment Act, 2007. The redundancy as alleged for the claimant was not established because the respondent testified that there was no abolition of office but that interviews were conducted to fill the vacancies following the otherwise lapsing of the grievants' fixed term contracts. The court has to determine whether the respondent overlooked the grievants' conversion under the statutory and CBA provisions to "**regular terms**". What amounts to the regular terms? The court considers regular terms of service to entail terms applicable to employees emplaced on the permanent service and subject to the minimum terms and conditions of service in the Employment Act, 2007 and as is agreed between the parties. Clause 19 of the CBA provides that the employer may employ persons on a temporary or seasonal basis for a period to be specifically advised to the employee and such period shall not exceed 1 year. It further provides that temporary or seasonal employment may only be offered for genuine temporary or seasonal purposes or projects. Under the clause, the seasonal or temporary employees will be subject to the same terms and conditions of service as other employees in accordance with section 35(1) (c) of the Employment Act, 2007. The clause further provides:
  - a. The employer shall not terminate the services of a temporary or seasonal employee after completion of an aggregate of one year service or less and employ a new employee in his place nor shall the employer reemploy the temporary or seasonal employee within a short period of time in order to avoid employing that temporary or seasonal employee on permanent basis.
  - b. Should the temporary or seasonal employee then be engaged in permanent employment for the same employer, the provisions of clause 1 of the CBA on probationary terms will not apply.

The court considers that otherwise for the lapsing of the fixed term contracts, the grievants were serving on fixed term contracts, the continuous service was for over six months renewed over a period of two or more years respectively and the respondent and grievants otherwise enjoyed a cordial employment relationship. The conversion rule aims at protecting the employees so that in event of permanent job, such employees should not continue to serve upon the temporary or seasonal terms. In the considered view of the court, the grievants within clause 19 of the CBA were entitled to continue in service either by renewal of their respective contracts or being emplaced on the permanent service failing which they were entitled to the consequences of section 35(1) (c) of the Employment Act, 2007 as per the provisions of clause 19 prescribing a termination notice of 28 days or pay in lieu of the notice under section 36 of the Act. So, did the respondent issue such notice? The last of the renewal contracts as issued and addressed to the grievants stated as follows:

#### **"RE: RENEWAL OF CONTRACT**

**I am pleased to inform you that management has approved the renewal of your contract as a waiter (or other relevant designation as the case obtained) for a period of six (6) months with effect from 1<sup>st</sup> July 2012-1<sup>st</sup> January 2013.**

**Should there be need to terminate your services before the expiry of the contract duration, written notice will be required from either party as indicated in your letter of contract. However, no notice period will be required with respect to the normal expiry of the contract. Renewal of the contract will be based on availability of work and your performance; and this will be a prerogative of Management.**

**All other terms and conditions of service remain per your earlier letter of contract.**

**Signed**

**JULIET OTIENO**

**HUMAN RESOURCE MANAGER”**

Each of the grievants accepted the contract by signing and endorsing the national identification card number and the date. The initial letter of contract prescribed 15 days termination notice or pay in lieu of such notice. The court has carefully considered the circumstances of this case and finds that the respondent indeed complied with the termination notice the grievants were entitled to consequential to the conversion to the regular terms under clause 19 of the CBA and under section 35(1) (c) of the Employment Act, 2007 because such notice was the content and essence of the last renewal contract. In any event, the respondent did not overtly terminate the services of the grievants but the contracts lapsed as per the free will of the parties under the fixed term contract.

In **Ruth Gathoni Ngotho-Kariuki –Versus- Presbyterian Church of East Africa and Presbyterian Foundation Industrial Cause No. 509 of 2010 at Nairobi at page 16** of the judgment, this court upheld the opinion that employers are not under any obligation to give employees reasons for non-renewal of fixed term contracts unless there is such an obligation created in the expiring contract. In the instant case, did such obligation arise and if yes, did the respondent discharge it? The contracts stated thus, “**....Renewal of the contract will be based on availability of work and your performance; and this will be a prerogative of Management....**” By that contractual provision, the court finds that the obligation accrued because the provision promised a renewal subject to availability of work and performance of the employee. Did the respondent discharge the promised obligation?

By the letter dated 18.12.2012 being part of appendix 6 on the supplementary memorandum of claim, the respondent addressed each of the grievants as follows:

**“RE: NOTIFICATION OF EXPIRY OF YOUR CONTRACT**

**Following the impending expiry of your contract on 31.12.2012 and the planned major upgrade of the Hotel leading to closure of some sections, we shall therefore need a lower number of staff effective January 2013.**

**In line with the Company Policy and Practice, your dues will be paid as follows;**

- **Salary upto 31<sup>st</sup> December 2012.**
- **Any outstanding leave days.**
- **Any outstanding off days.**
- **Less any monies owed to the company.**

**You are required to handover all company assets in your possession and sign the clearance form to facilitate preparation and payment of your dues.**

**You are however encouraged to apply by 24.12.12 should you wish to be considered for the chances available.**

**On behalf of the Management and staff of Merica Hotels, I wish to thank you for the services rendered and wish you well in all your future endeavours.**

**Yours Faithfully,**

**For: MERICA HOTEL**

**Signed**

**FIONA AVINASH W.**

**HUMAN RESOURCE MANAGER”**

The court finds that by reason of the chance offered in the foregoing letter, the respondent discharged the contractual obligation of the promised renewal subject to availability of work and performance of the employee. The court finds that the respondent acknowledged availability of work for some of the grievants and chose to deal with the issue of performance to identify those of the grievants to be retained upon renewal through the application and selection process. RW told the court that the respondent true to the promise invited applications from staff as per the letter above and employees who applied were interviewed and appointed to the vacancies. That evidence was not rebutted and the court finds that the respondent discharged its obligation in the fixed term contract namely, the contractual obligation of the promised renewal subject to availability of work and performance of the employee.

8. The preliminary issue was about the irregular and incompetent initial memorandum of claim. The claimant anchored its case on the supplementary memorandum of claim and submitted that it had dismembered its case from the initial memorandum. The court noted that the respondent did not urge the preliminary point in the final submissions and the court deemed the issue as abandoned. The court noted the absence of a proper memorandum of response and on the whole, parties to the proceedings are required to comply with the rules on pleadings. In the circumstances of the case, it is the opinion of the court that the defects will not occasion the parties significant prejudice as the issues as submitted upon sufficed.
9. The court has considered the circumstances of the case, the margin of success of each party and the need to foster amicable relationship between the parties and finds that each party shall bear own costs of the case. The court has also noted that the respondent did not urge for costs in the final submissions and RW told the court that the respondent was in the process of rejuvenating its relationship with the claimant as it had been found beneficial to both parties.

In conclusion, judgment is entered for the parties for:

- a. **A declaration that the parties were at all material times bound by the recognition and collective agreements as signed on 22.06.2012 between the claimant and the Union of Kenya Hotelkeepers and Caterers Association.**
- b. **A declaration that the respondent discharged its obligations under the individual fixed term contracts and the collective agreement.**
- c. **Each party to bear own costs of the case.**

**Signed, dated and delivered in court at Nakuru this Friday, 19<sup>th</sup> July, 2013.**

**BYRAM ONGAYA**

**JUDGE**