



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 358 of 2012

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

VERSUS

RATNA TSAVO LODGES.....RESPONDENT

KUDHEIHA WORKERS.....INTERESTED PARTY

JUDGMENT

The Claimant herein Kenya Hotels and Allied Workers Union filed a Notice of Motion under Certificate of Urgency on 5th March 2012 praying for the following orders.

1. ***THAT, this application be certified as urgent and be heard on priority basis.***
2. ***THAT, this application be heard Ex-parte in the first instance***
3. ***THAT, the Respondent be ordered not to replace any member of the Applicant with the new hired staff and or not to terminate their services on ground of trade union affiliation/activities till the hearing and determination of this service.***
4. ***THAT, the Respondent be ordered to comply with section 48 of the Labour Relations Act, 2007 by way of deducting and depositing the Union dues in the Applicant account gazetted by the Minister.***
5. ***THAT, the Respondent be ordered to allow the Applicant to access her members without any interference.***
6. ***THAT, the Respondent be restrained from victimizing members of the Applicant on ground of trade union affiliation/activities till the hearing and determination of this cause.***
7. ***THAT, the Respondent action of termination the service of the works committee he stayed till the hearing and determination of this suit.***

They simultaneously filed a memorandum of claim in which they sought the following orders;

4.1 ***THAT, the Respondent be ordered to comply with the mandatory provisions of the law which is section 48 of Labour Relations Act 2007 by way of deducting and remitting union dues to the Claimant's gazetted account.***

4.2 ***THAT, the Respondent and/or her agents be ordered not to victimize the Claimant members on account of trade union activities/affiliation.***

4.3 ***THAT, the Respondent be ordered to allow the Claimant to access her members at work place at any appropriate time.***

4.4 THAT, the laid of employees be reinstated without loss of benefits

4.5 THAT, the parties here in be ordered to sign Recognition Agreement

within the shortest time possible as the Court may deem fit.

4.6 THAT, the cost of suit be paid by the Respondent.

4.7 THAT, any other order the Court may deem fit to grant.

The application was placed before Hon. Justice Madzayo (now retired) who gave his ruling on 7th March 2012 as follows:

- 1. THAT the application herein be and is hereby certified as urgent and it to be heard on priority basis**
- 2. THAT the Application be served upon the Respondent forthwith**
- 3. THAT the Respondent files and serves its Replying Affidavit on or before 16th March, 2012.**
- 4. THAT the application be heard interpartes on 27th March 2012 at 12.00 noon before Hon. Justice Mukunya**

The parties appeared before Hon. Isaac E. K. Mukunya (now retired) on 16th March 2012 when he consolidated the issues in the application with the claim and directed that the consolidated claim be heard on 27th April 2012.

On 27th April 2012 the Respondent was granted leave to file its response on or before 11th May 2012. When the case came up for hearing on 31st May 2012, the Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers applied to be as Interested Party. Since both the Claimant and Respondent had no objection KUDHEIHA Workers was joined the interested party. The Court also gave directions on filing of pleadings by the Interested Party and rescheduled the hearing of the case to 25th October 2012 when the parties appeared before me and the hearing proceeded.

Claimants case:

Mr. Makale on behalf of the Claimant submitted that the issues in dispute as filed by the Claimant are the following:-

1. Refusal to deduct unions dues
2. Victimization of Claimants members for participation in trade union activities.
3. Refusal of the Respondent to accord Claimant Union recognition.
4. Refusal by the Respondent to accord the Claimant to her members.

He reiterated the contents of the memorandum of claim and the prayers therein.

THE RESPONDENTS CASE

The Respondent relied on the grounds of opposition filed on 15th March 2012, the replying affidavit of **PERMINUS RIUNGU** deponed on 15th March 2012 and the memorandum in Reply filed in Court on 24th May 2012.

The Respondent informed the Court that the dispute was being handled by the District Labour Officer at Voi but the Claimant moved to Court before the District Labour Officer finalized the conciliation.

The Respondent submitted that the action to by pass the Labour Officer was malicious and irregular. The Respondent also submitted that there were cross cutting issues in the claim and addressed the Court on all the issues in dispute expounding on the issues in the grounds opposition, replying affidavit and reply memorandum. He submitted that the Respondent is ready to continue with the conciliation process to conclusion.

INTERESTED PARTY'S CASE

Mr. Mwari Stephen Njiru for the interested party also relied on their statement of Response filed in Court on 20th June 2012. The interested party submitted that the issues filed are not all issues that should come to Court under certificate of urgency, that the employees of the Respondent are members of the Interested Party and are currently covered and benefiting from the Collective agreement signed between the Kenya Association of Hotel Keepers and caterers and the Interested Party and that the Claimant should not interfere with its members. He urged the Court to dismiss the claim.

Having heard the parties and carefully considered the issues raised in the pleadings filed by the parties, I find that there is a misjoinder of issues in the dispute. All the issues raised in the Claimants notice of motion and memorandum of Claim are issues that should have been subject of different disputes. The issues raised are the following

- (i) Failure to deduct union dues
- (ii) Refusal to grant the Claimant access to members
- (iii) Victimization /unfair termination of Claimant members on account of union activities
- (iv) Recognition agreement

I also find that all the issues fall under section 62 of the Labour Relations Act. Indeed as submitted by the Claimant and the Respondent, the Minister for Labour has already appointed the District Labour Officer Voi as conciliator on the dispute on recognition agreement and at the time of filing this dispute the parties had been called in a meeting which was postponed by the Claimant. Section 15 of the Industrial Court Act 2011 empowers this Court to refuse to determine a dispute unless satisfied that there has been an attempt to effect settlement through conciliation among other modes of settlement and to refer a dispute to conciliation if it becomes apparent during proceedings that the dispute ought to have been referred to conciliation.

I find that this dispute was referred to this Court prematurely and unprocedurally. The Claimant has during the proceedings demonstrated this by requesting to be given an opportunity to file supplementary submissions in respect of the 3 grievants alleged to have been terminated unfairly.

For the foregoing reasons I find that this dispute has no merit and dismiss the same. The parties are directed to continue with the conciliation proceedings that are still pending before the District Labour Officer, Voi while the Claimant is advised to report disputes in respect of the other issues in accordance with the provisions of the Labour Relations Act 2007.

Each party shall bear its costs.

DATED AND DELIVERED IN NAIROBI AT THIS 14TH DAY OF DECEMBER 2012

HON. LADY JUSTICE MAUREEN ONYANGO
JUDGE