



REPUBLIC OF KENYA.
IN THE INDUSTRIAL COURT OF KENYA
AT NAIROBI

(Before: Charles P. Chemmutut, J.,

J.M. Kilonzo & O.A. Wafula, Members.)

CAUSE NO. 111 OF 2006.

KENYA HOTELS & ALLIED WORKERS' UNIONClaimants.

v.

BAOBAB HOLIDAY RESORT LTD.Respondents.

Issue in Dispute:-

“Refusal to sign Recognition Agreement.”

Ms. Dalphine Muude, Industrial Relations Officer, for the Claimants (hereinafter called the Union).

Mr. A.O. Ambenge, Senior Executive Officer, F.K.E., for the Respondents (hereinafter called the Resort).

A W A R D.

The Union was registered as such on 3rd November 1999, under Section 11 of the Trade Unions Act, Cap. 233, Laws of Kenya; and pursuant to Article IV(a) of Clause 3.1 of its Constitution, the Union is allowed to seek membership from “all employees engaged in hotels, restaurants, casinos, catering and similar establishments providing food and beverages or both and further categories of related establishments providing tourism services, clubs, guest houses, camping sites, golf clubs and all other institutions and projects associated with them provided that such employees are of apparent age of eighteen years.” The Resort is a business entity operating as a hotel in the North Coast, Mombasa, of Coast Province, and was registered as such by the Ministry of Tourism and Wildlife under the Hotels and Restaurants Authority Act, Cap. 494, Laws of Kenya, to engage in hotel business.

The Resort was initially a member of the Kenya Hotel Keepers and Caterers Association (which is hereinafter called the Association) and its employees were members of Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers' Union, commonly known as KUDHEIHA Workers Union. Sometime between March and May, 2003, the Union enrolled all the unionisable employees in the establishment of the Resort as its members, and in exercise of their constitutional right under Section 80 of the Constitution of Kenya and the ILO Convention No. 87, they voluntarily joined the Union. Consequently, the Secretary General of the Union served the management of the Resort with a check-off forms pursuant to the provisions of Section 46(1) of the Trade Disputes Act, Cap. 234, Laws of Kenya (which is hereinafter referred to as the Act). The management of the Resort complied with the Minister for Labour's notice under Section 45 of the Act; and in accordance with Section 47(I) (a) of the Act, the management of the Resort remitted and continued to remit to-date the union dues of about 40 unionisable employees to the Union.

On 24th March, 2003, the Union sought recognition from the Resort on the following grounds:-

- (i) that it had recruited all the employees of the Resort as its members;
- (ii) that it was the right and appropriate Union to represent the employees of the Resort, and
- (iii) that there was no rival union claiming recognition or representation of the employees.

The management of the Resort declined to accord the Union recognition; and aggrieved by this decision, the Union reported an

informal trade dispute to the District Labour Officer, but the management of the Resort persisted in their refusal to accord recognition to the Union. In consequence, the Union reported a formal trade dispute to the Minister in accordance with Section 4 of the Act. The Minister accepted the dispute and appointed Mr. A.K. Nyaga of Mombasa Labour Office to act as the Investigator. On 15th September, 2005, the Minister released his report to the parties in which he found and recommended as follows:-

“FINDINGS.

..... Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA) had a recognition agreement with Baobab Holiday Resort Limited. That this recognition had been the subject of a dispute that was resolved through recommendation of the Minister. Moreover, the Industrial Court had ruled earlier that Kenya Hotels and Allied Workers Union keep off Hotels that subscribe to Kenya Hotel Keepers Association. It would appear that KHAWU did not honour that ruling and went ahead to recruit the same members that Kudheihha had recruited and sought recognition agreement and eventually granted. It is only fair that Kudheihha is allowed to exercise the mandate to avoid any confusion among the employees that may disrupt industrial peace. The Kenya Hotel and Allied Workers Union attempt to seek for recognition must fail.

RECOMMENDATION.

..... I recommend that Kenya Hotel and Allied Workers Union be denied recognition.”It would appear that the management of the Resort accepted the recommendation, but the Union rejected it on the ground that the same was misleading, untrue, biased and invalid. (see Union Apps. JOI to JO10 and Resort Ann. 2).

In the circumstances, the Secretary General of the Union signed and forwarded, through the Minister for Labour, a Notification of Dispute, Form ‘A’, to the management of the Resort, for their counter-signature to enable the Court to adjudicate and determine the matter. The management of the Resort declined and refused to countersign the notification of dispute (see Union Apps. 11 & 12). This being the position, the Minister invoked his powers vested in, or conferred upon, him under Section 8 of the Act and referred this dispute to the Court on 31st October, 2006 for adjudication and determination. The Minister’s reference, together with the statutory certificate from the Labour Commissioner under Section 14(9)(e) of the Act, were received by the Court on 3rd November, 2006. The dispute was then listed for mention on 22nd November, 2006 and the parties were notified to appear. On this occasion, Mr. Patrick Makale appeared for the Union, but there was no appearance for the Resort. In spite of the latter’s absence, however, the parties were directed to submit or file their respective memoranda or statements on or before 19th December, 2006, and 26th January, 2007, and the dispute was listed for another mention on 15th March, 2007. Mr. Joanes Okotch, Secretary General, submitted his memorandum, on behalf of the Union, on 19th December, 2006, but the Resort did not file its reply statement as directed hereinabove. By a letter, dated 5th February, 2007, the matter was brought forward for mention on 8th February, 2007, to fix another convenient date for hearing. On this day, Ms. Dalphine Muude appeared for the Union, and Mr. Harrison O. Okeche, who appeared for the Resort, was directed to file his reply statement on or before 22nd February, 2007, and the case was fixed for hearing in Mombasa on 6th March, 2007. Mr. Ambenge filed his reply statement, on behalf of the Resort, on 1st March, 2007, and the dispute was heard as aforesaid, i.e on 6th March, 2007.

Ms. Muude submitted that the Investigator’s report was unfounded, incorrect and misleading because he neither disclosed the alleged order under reference NO. ML/IR/161/96, dated 28th August, 2003, nor did he observe the legal requirements of Section 5(2) of the Act. But she conceded that the Union was only aware of an order under reference NO. ML/IR/161/96, dated 25th August, 2003. Ms. Muude averred that the Resort was at liberty to challenge the non-compliance of the alleged order of the Court, if any, otherwise she vehemently denied any existence of a recognition agreement between the Association and KUDHEIHA Workers Union; and, she said, if there was any, the same was null, void and not binding. Ms. Muude contended further that in March, 2003, all the unionisable employees of the Resort resigned from KUDHEIHA Workers Union and joined the Union in this dispute. (see Union App. J.13); and by their letter, dated 1st May, 2003, to the Minister the said employees denounced their alleged membership with KUDHEIHA Workers Union and confirmed being members of the Union herein (see Union App. J.14). Finally, Ms. Muude criticized the management of the Resort for victimizing, intimidating, frustrating and discriminating against the employees as a result of joining the Union (see Union App. J.15).

For the foregoing reasons, Ms. Muude prayed that the Resort accord formal recognition to the Union.

In response, Mr. Ambenge opposed the demand by the Union for recognition on the ground that in July, 2003, the Union had enrolled 33 members out of a workforce of 80 unionisable employees, but the number has since dwindled due to retirement, terminations and resignations since 2004, and currently the Union has only 3 members out of a total workforce of 70 unionisable employees. Therefore, the Union has not satisfied or met the requirements of a statutory simple majority as stipulated under Section 5(2) of the Act (see Resort Anns. 1,3 & 4).

Mr. Ambenge, therefore, urged the Court to find that the Union has failed to prove a case for recognition by the Resort for lack of a simple majority; and accordingly prayed that the demand by the Union be rejected.

Admittedly, KUDHEIHA Workers Union has had a valid recognition agreement with the Association, of which the Resort was a member, but its membership has since ceased. This is supported by para. 2 of the submission of the Resort, which states that “the Resort were initially members of Kenya Hotel Keepers and Caterers Association”. In *Cause No. 8 of 2003*, the Union in this dispute was denied recognition because, while it was still pursuing its case to gain recognition from the Association and/or its individual members, KUDHEIHA Workers Union had a valid recognition agreement with the Association. The Court observed at page 12 therein as follows:-

‘The latter Union might have enrolled most or majority of the employees in this industry as its members, but this is not enough in a dispute like this at hand because the Act and the Industrial Relations Charter require and enjoin us to strictly observe the tenets of “industrial trade unionism”..... However, if and when the second Union will secure a simple majority of the unionisable employees of the Association’s members, either collectively or individually, then its representative capacity will be decided on its own circumstances and merits.’

It is not denied that the Union in this case has satisfied grounds (ii) and (iii) at pages 3 to 4 hereinabove as it is the relevant and specific Union for this particular industry or sector. But the Resort urged the Court to deny it recognition simply and only because “the Union has not met the statutory simple majority membership to warrant any recognition”.

The Resort is no longer a member of the Association with which KUDHEIHA Workers Union had a recognition agreement, and the present Union has enrolled all the unionisable employees in the establishment, although it is alleged that in July, 2003, the Union had enrolled 33 members out of a total workforce of 80 unionisable employees, but the number has since dwindled due to retirement, terminations and resignations since 2004, and currently it has only 3 members out of a total workforce of 70 unionisable employees. The union may have the said members now, but the relevant period for purposes of recognition was in July, 2003, when it is alleged to have recruited 33 out of 80 unionisable employees, during which the said period the Secretary General of the Union forwarded check-off forms to the management of the Resort and the latter effected the check-off system by remitting the Union dues without formally recognizing the Union. One, therefore, wonders why the management of the Resort are reluctant to formally recognize the Union and yet they have complied and still are complying with the check-off system.

On very careful consideration of the submissions by the parties and the documentary evidence on the record, we are satisfied that the Union has satisfied the requirements under Section 5(2) of the Act for recognition by the Resort. In the circumstances, we take great exception to the Minister’s findings and recommendation; and, on the contrary, award that the Resort accord formal recognition to the Union as the right and appropriate one to represent the interests of its unionisable employees. We **ORDER** further that the parties should sign a formal recognition agreement within **two (2) months** from the date of this award for purposes of collective bargaining.

DATED and delivered in Nairobi this 19th day of June, 2007

Charles P. Chemmutut, MBS.,
JUDGE.

J.M. Kilonzo,
MEMBER.

O.A. Wafula,
MEMBER.