

**IN THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**LABOUR DISPUTE NO. 02 OF 2017**

**CONSERVATION HOTELS DOMESTIC**

**SOCIAL SERVICES AND CONSULTANCY**

**WORKERS UNION (CHODAWU) ..... COMPLAINANT**

**VERSUS**

**SOUTHERN SUN HOTEL TANZANIA LTD**

**T/A SOUTHERN SUN DAR ES SALAAM ..... RESPONDENT**

**JUDGMENT OF THE COURT**

**I. ARUFANI, J.**

The complainant, CHODAWU instituted in this court the complaint at hand seeking for an order to compel the respondent to restore to it access to exercise organizational rights at the respondent's workplace. The respondent disputed the complaint and stated that, the Recognition Agreement entered between them was lawfully terminated and now the complainant has no members at the respondent's workplace. The respondent prays

the complaint to be dismissed with costs for being devoid of merit.

The background of the complaint as can be deduced from the documents filed in this court by the parties is to the effect that, the respondent granted the complainant access to exercise their organizational rights at its workplace on October 2012 and the complainant started to recruit members at the respondent's workplace. On 14<sup>th</sup> March, 2014 the parties entered into a recognition agreement whereby the complainant was recognized as the collective bargaining agent at the respondent's workplace. The parties agreed that, the respondent would have negotiated with the complainant annually in respect of wages and terms and conditions of employment for all Union members falling within the bargaining unit.

On 1<sup>st</sup> April, 2014 the respondent increased the wages of employees who were not members of the complainant by 10% and wages of the employees who were members of the complainant were not increased. The complainant and the respondent convened a meeting to negotiate the wages of their members and they proposed the wages of their members to be increased by 20% but the respondent refused to accept the said proposal. After several correspondences between the parties and

failed to agree on the increase of the wages of the employees who were members of the complainant, on 6<sup>th</sup> February, 2015 the respondent issued to the complainant a three month notice to terminate recognition agreement. The ground for termination of the recognition agreement is that, the complainant has breached the terms of recognition agreement.

After expiration of the period of notice issued by the respondent to the complainant, the complainant referred the dispute to the Commission for Mediation and Arbitration for mediation and after the mediation failed the complainant filed the dispute in this court. The issues framed for determination in the dispute at hand are as follows:-

1. Whether complainant was denied right of access to the employer premises to exercise organizational rights.
2. If the answer to the first issue is in affirmative whether that amount to interference of freedom of association.
3. To what reliefs are the parties entitled.

During hearing of the dispute the complainant was represented by Mr. Evance Nzowa, learned counsel and the respondent was represented by Mr. Waziri Mchome, learned counsel. Each side called one witness to testify on its side.

**Asteria Gerald, (CW1)** testified for the complainant and while being led by Mr. Evance Nzowa she told the court that, she is a lawyer employed by the complainant. She said the Organizational rights of the complainant are the rights of the complainant to get members at the working place, to establish branches, to get fees from their members and to train their members. She said the recognition agreement gives the Union right to enter into negotiation with the employer in respect of the rights of their members.

She said they started exercising organizational rights at the respondent's workplace on October, 2012 and they started getting members on November, 2012. She said on 14<sup>th</sup> March, 2014 the union signed a recognition agreement with the respondent. The witness said that, on 2<sup>nd</sup> June, 2014 the respondent issued a notice to its employees showing increment of wages for workers who were not members of the complainant and the complainant's members were told to wait negotiation between the complainant and the respondent.

She said after issuance of the said notice the complainant wrote a letter to the respondent to complain what was done by the respondent is discrimination and prayed if there is increment of wages it should be done to all employees without

discrimination. CW1 said that, on 10<sup>th</sup> February, 2015 the respondent issued a notice to the complainant showing that, on 6<sup>th</sup> May, 2015 they would have terminated the recognition agreement. The witness tendered in court the notice of termination of collective agreement entered by the complainant and the respondent dated 6<sup>th</sup> February, 2015 and it was admitted in the case as an exhibit C1.

She stated further that, on 18<sup>th</sup> May, 2015 the respondent wrote a letter to the complainant indicating that, they had already terminated the recognition agreement and they will no longer have any relationship with them and stopped deducting their fees from their members. She said they have never received any letter from any of their members indicating they have terminated their membership. Finally she prayed the court to restore their organizational right of access at the premises of the respondent to continue to exercise their organizational rights.

When CW1 was cross examined by the counsel for the respondent she said she don't know how many members they had recruited up to when the recognition agreement was terminated and she don't know how many members they have at the respondent's working place up to now. She also said she don't have the actual figure of the members whose fees were supposed

to be paid to the complainant. She stated further that, although they have never received any letter from any member to show they will not pay their membership fees to the complainant but the respondent has never remitted any fees to them from when the recognition agreement was terminated.

CW1 stated that, she has not tendered in court any letter as an exhibit to show the respondent denied them right of entering at their place of work to exercise their organizational rights. She stated further that, they cannot go to the place where there is no good relationship between the union and the employer to exercise their organizational rights like recruiting members and others.

**Daudi Kasone, (RW1)** testified for the respondent and while being led by the counsel for the respondent he told the court that, he is a financial controller at the respondent's Hotel. He said the complainant has no members at their Hotel. He said the complainant went to their Hotel and after discussion they entered into recognition agreement. He said he has not seen any letter prohibiting the complainant to exercise their organizational rights at the respondent's workplace. He said the complainant's prayer that their organizational rights at the respondent's hotel be restored has no basis because they have never been denied right

to exercise their organizational rights and prayed the complaint to be dismissed.

When cross examined by the counsel for the complainant he said that, before termination of the recognition agreement the complainant had members at their workplace. He said after termination of the recognition agreement the employees of the respondent who were members of the complainant wrote a letter to show they have terminated their membership with the complainant. He said the letter was written and signed by Chairman and Secretary of the Union branch and from there they stopped deducting fees from the members of the complainant.

He stated further that, without recognition agreement the organization cannot do their functions at the premises of the respondent. He also said they will not refuse to allow the complainant to exercise their organizational rights at the respondent's workplace if the court will make an order to that effect and if the procedure for having a recognition agreement will be followed. When re-examined by the counsel for the respondent he said they have never denied the respondent to exercise their organizational rights at their place of work. He said that, as they have never denied the complainant right to exercise

their organizational rights, they cannot be granted what they have never been denied.

Counsel for the parties filed their final submission in this matter whereby while the counsel for the complainant tried to show how the organizational rights of a registered union are governed under part V of the ELRA the counsel for the respondent tried to pursued the court to find those rights have never been taken away from the complainant by the respondent. The court will refer to their submissions whenever it will find there is a necessity of doing so.

Starting with the first issue which is asking whether the complainant was denied right of access to the employer's premises to exercise their organizational rights the court has found proper to state at this juncture that, as rightly argued by the counsel for the parties the organizational rights for any trade union are provided under Part V of the ELRA. Section 60 (1) of the Act states that, any authorized representative of a registered trade union shall be entitled to enter the employer's premises in order to recruit members, communicate with members, meet members in dealing with employer, hold meetings of employees on the employer's premises and vote in any ballot under the union constitution.



Other organizational right provided under section 60 (2) of the above referred Act is right to establish a field branch at any workplace. It is also provided under section 61 (1) and (2) of the Act that, registered trade union is entitled to get dues from the wages of employees who are members of the trade union and those dues are supposed to be deducted by the employer and remitted to the trade union. Another right provided under section 62 of the Act is the right of representation.

Further to that if a registered trade union is recognized in terms of section 67 is entitled to be provided by an employer with reasonable and necessary facilities to conduct its activities at the workplace as provided under section 60 (3) of the Act. As stated by CW1 and without being disputed by RW1 and as shown hereinabove the complainant was given a chance to exercise those rights at the workplace of the respondent from 2012 and managed to enter into a recognition agreement in 2014 and became a bargaining agent at the workplace of the respondent.

Now the complainant's assertion is that, it can no longer access the respondent's workplace to exercise those rights as the recognition agreement they had entered has already been terminated by the respondent and the respondent has declared they will no longer have any relationship with the complainant.

That being the complaint it is now the task of the court to determine if the complainant has managed to prove they have been denied access to the respondent's workplace to exercise its organizational rights.

The court has found as the complainant's allegation is that it has been denied right of access to the respondent's workplace to exercise its organizational rights, the duty to prove the said allegation is on the complainant's shoulder. The above finding of this court is supported by what was stated in the case of **Hamid Mfaume Ibrahim V. KBC Tanzania Ltd**, [2014] LCCD 13 where it was held that:-

*"The law under section 112 of the Evidence Act (Cap 6 R.E. 2002) provides clearly that: **"The burden of proof as to any particular facts lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of such facts shall lie on any other person"**. And in **Abdul-Karim Haji V. Raymond Nchimbi Alois and Joseph Sita Joseph**, (2006) T.L.R. 420 the court held that; **"It is an elementary principle that he who alleges is the one responsible to prove his allegation"**.*

While being guided by the above position of the law the court has gone through the evidence adduced before the court by CW1 and find that, apart from mere words that the complainant has been denied right of access into the respondent's workplace to exercise its organizational rights there is no evidence adduced by that witness to establish existence of the alleged denial. The court has found it has not been told if the complainant has ever demanded or gone to the respondent's working place to exercise its organizational rights provided under the provisions of the law cited hereinabove and denied access to exercise those rights.

To the contrary the court has found the evidence of RW1 is very clear that the complainant has never being denied access to exercise its organizational rights. Further to that, the court has found exhibit C1 which was tendered in court by CW1 to establish the respondent denied the complainant's right of access into its working place to exercise its organizational rights is not stating anywhere that the complainant was denied right to access into the respondent's working place to exercise its organizational rights.

The court has found exhibit C1 is very clear that, the relationship which exhibit C1 states will not continue between the respondent, and the complainant after termination of the

collective agreement as provided under paragraph 7 read together with paragraph 8 of exhibit C1 is the relationship in respect of the collective agreement which has also been referred by the parties in this matter as a recognition agreement. The mentioned paragraphs states as follows:-

*"7. In all of the circumstances, the company has decided not to continue its relationship with the union.*

*8. All rights and obligations between the company and the union **in terms of the collective Agreement** will therefore cease with effect from 9<sup>th</sup> May, 2015".*

(Emphasis added).

In my view the wordings of the above paragraphs do not show the complainant was denied right to access at the respondent's working place to exercise its organizational rights prescribed under the provisions of the law mentioned earlier in this judgment. The only relationship which the court has found was terminated by that notice is the right of the complainant to be recognized as a bargaining agent at the respondent's working place which is provided under section 67 of the ELRA.

As the court has been informed by the counsel for the parties that the issue as to whether termination of the recognition

agreement which had been entered by the complainant and the respondent, done by the respondent was lawful or not is an issue in another matter pending in this court the court will not deal with that issue. That being the position the court has gone through the final submission of the counsel for the complainant and find he has submitted at the first paragraph of page 6 of his final submission that, the right of a registered trade union to access an employer's premises to exercise its organizational rights, does not depend on the existence of a Recognition Agreement.

The court is in agreement with the complainant's counsel submission that, the organizational rights provided under the provision of the law cited hereinabove can be exercised by a trade union at an employer's working place notwithstanding the fact that the parties have no recognition agreement. Further to that, the court has found those rights do not depends on the wish of an employer to allow a trade union to exercise them as they are provided under the provisions of the law cited in this judgment in a mandatory way.

The court has arrived to the above view after seeing the provisions of the law referred hereinabove which provides for those rights are couched with the word "shall" which means the right provided under those provisions of the law cannot easily be

denied. This view is getting support from the **Black's Law Dictionary** (Abridged sixth Edition) where the authors states thus:

*"As used in statutes, contracts, or the like, this word is generally imperative or mandatory. In common or ordinary parlance and in its ordinary signification, the term "shall" is a word of command, and one which has always or which must be given a compulsory meaning as denoting obligation ..."*

Under those circumstances it cannot be said the respondent could have denied the complainant right of access at its place of work to exercise its organizational rights provided under the law in a mandatory way. Therefore the complainant's allegations that it has been denied right to access at the respondent's working place to exercise its organizational rights while the complainant has never gone to the respondent's premises to exercise its organizational rights and denied access cannot be said is meritorious.

The court has considered the evidence of CW1 that the respondent has stopped deducting dues from its members and remit it to the complainant from when the recognition agreement

was terminated and the evidence by RW1 that the complainant has no any member at its working place and find that cannot be a ground to establish the respondent has denied the complainant access to exercise its organizational right.

The court has found as stated earlier in this judgment there is no dispute that before termination of recognition agreement the complainant had members at the respondent's working place and that was the criteria for the complainant and the respondent to enter into a recognition agreement which was terminated by the respondent. The court has also found CW1 told the court they have not received any written notice from any of its members expressing his or her intention to revoke his or her membership with the complainant.

That being the position the court has found the complainant was required to make a follow up and know how many members they have at the respondent's working place before rushing to complain the respondent has stopped to deduct dues from their members while they don't know how many members they have. After knowing the number of members they have is when they would have claim for their dues from the respondent under section 61 (3) of the ELRA. Instead of doing so the complainant is complaining it has been denied right of getting dues form its

members by the respondent while they do not know how many members they have at the respondent's working place.

In the light of all what I have stated hereinabove the court has found as rightly submitted by the counsel for the respondent the complainant has not managed to prove was denied right to access at the respondent's premises to exercise its organizational rights. That makes the court to find the answer to the first issue is supposed to be in negative. Since determination of the second issue is depending on the answer from the first issue and as the first issue has been answered in negative it is obvious that the second issue is also supposed to be answered in negative.

Having determined both issues in negative the court has found the relief which deserve to be awarded in this matter is to dismiss the complaint for being devoid of merit. The court has considered the prayer of costs made in this matter by the counsel for the respondent and find this is a labour matter where costs are only awardable where the court is satisfied the matter is frivolous or vexatious. The court has found as it has not been satisfied the matter is frivolous or vexatious it is proper to make no order as to costs in this matter. Therefore the complaint is dismissed with no order as to costs.



Dated at Dar es Salaam this 19<sup>th</sup> Day of September, 2019



**I. ARUFANI**

**JUDGE**

**19/09/2019**

**IN THE HIGH COURT OF TANZANIA**  
**LABOUR DIVISION**  
**AT DAR ES SALAAM**

**LABOUR DISPUTE NO. 02 OF 2017**

**BETWEEN**

**CHODAWU ..... APPLICANT**

**VERSUS**

**SOUTHERN SUN HOTEL (T) LTD. .... RESPONDENT**

**Date: 19/09/2019**

Coram: Hon. E.G. Mrangu, DR.

Applicant: Evarist Kamaja, Advocate

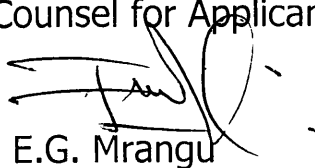
For Applicant:

Respondent:

For Respondent: Evarist Kamaja, Advocate

C.C. Jane Lwiza

**Court:** This Judgment is delivered in chamber this 19<sup>th</sup> day of September, 2019 in presence of the Mr. Evarist Kamaja, Learned Counsel for Respondent, who also hold brief of Mr. Evans Nzoa, Learned Counsel for Applicant.

  
E.G. Mrangu

**DEPUTY REGISTRAR**

19/09/2019