IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 37 OF 2014

(CORAM: MUSINGA, GATEMBU & J. MOHAMMED, JJ.A.)

BETWEEN

MICATO SAFARIS ……APPELLANT

AND

KENYA GAME HUNTING

& SAFARI WORKERS UNION …….RESPONDENT

(Appeal from the judgment of the Industrial Court of Kenya at Nairobi, (Nduma, J.) dated the 20th day of November, 2013

in

INDUSTRIAL COURT CASE NO. 2437 OF 2012)

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JUDGMENT OF THE COURT

1. By a claim filed by the respondent on 3rd December, 2012 before the Industrial Court of Kenya at Nairobi, the respondent sought the following reliefs:

> **(a) The Court to award the respondent's members as per the respondent's proposal of the review of the collective Bargaining Agreement (CBA);**
>
> **(b) The appellant be ordered to pay union dues from when they stopped the Agency Fee and the union dues;**
>
> **(c) The appellant be restrained from terminating the Recognition Agreement between itself and the appellant.**

2. The genesis of the dispute was two notices dated 10th October, 2011 issued by the appellant to the respondent and the National Labour Board of the appellant's intention to terminate a Recognition Agreement between the parties that had been entered into on 4th August, 2003. The appellant also

intended to stop deduction of agency fees from employees of the appellant which was being paid to the respondent.

3. The appellant's reason for seeking termination of the Recognition Agreement was that the membership of the appellant's unionisable employees in the respondent had fallen below a simple majority, being only 3 out of 53 employees. This is in terms of **section 54 (1)** of the **Labour Relations Act No. 14** of **2007** which states as follows:

> **"An employer, including an employer in the public sector, shall recognize a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees."**

4. Although the respondent opposed the two notices, upon expiry of the notices the appellant stopped deducting union dues on behalf of the three members of the respondent and also stopped deducting Agency fee on behalf of the unionisable employees who were not subscribers to the union.

5. In an effort to remedy the situation, on 8th December, 2011 the respondent wrote to the Chief Industrial Relations Officer, Ministry of Labour, indicating that its unionisable employees who were not members of the union and on whose behalf the appellant had been deducting Agency fee had resolved on 30th March, 2011 to convert the Agency fee to subscriptions to the union in the form of union dues. However, the forms were dated 30th August, 2011.

6. On 24th August, 2012 the respondent reported a trade dispute to the Minister for Labour and on 26th September, 2012 the Minister accepted the dispute and appointed a conciliator.

7. The conciliator came to the conclusion that the appellant's termination of the Recognition Agreement was unlawful.

8. The appellant, having disagreed with the conciliator's findings, the respondent referred the matter to the Employment and Labour Relations Court as prescribed under the law.

9. The court found that the appellant's termination of the Recognition Agreement was null and void and ordered the appellant to negotiate a CBA with the respondent. The appellant was also ordered to deduct and remit union dues for the three (3) union members. Further, the appellant was ordered to deduct and remit union dues for the employees who were previously non-members of the respondent and who had allegedly joined the respondent. The judge concluded by saying that the appellant had violated **Articles 24** and **42** of the **Constitution.** We shall advert to those Articles later.

10. The appellant was aggrieved by that award and consequently preferred an appeal to this Court. Although the memorandum of appeal consists of 17 grounds of appeal, in their written submissions, the appellant's Advocates, M/S. Obura Mbeche & Company, clustered them into three broad categories. Grounds 1, 2, 3, 4, 5, 6, 14, 15, 16 and 17 raise the broad question of whether the notice that was sent by the appellant to the National Labour Board and to the respondent was sufficient to terminate the Recognition Agreement; grounds 7, 8, 9 & 10 address the question whether it was open for the learned judge to direct the appellant to enter into CBA negotiations with the respondent and to deduct and remit union dues for the 3 employees who were members of the union; and grounds 11, 12 and 13 address the question whether the learned judge erred in holding that **Articles 24** and **41** of the **Constitution** of **Kenya** had been violated.

11. We shall start by considering whether the notice to terminate the Recognition Agreement given by the appellant to the National Labour Board and to the respondent was sufficient.

12. The notice of termination of Recognition Agreement *(the notice)* that was issued on 10th October, 2011 by M/s. Obura Mbeche & Company Advocates for and on behalf of the appellant stated as follows:

"1. Notice is hereby given for and on behalf of our client, MESSRS MINI CABS AND TOURS LIMITED, that on expiry of NINETY (90) DAYS from the date of this letter MESSRS MINI CABS AND TOURS LIMITED will be terminating the Recognition Agreement between the company and the KENYA GAME, HUNTING & SAFARIS WORKERS UNION.

2. THIS NOTICE is grounded on the fact that of the FIFTY THREE (53) unionisable employees employed by the Company only THREE (3) are members of the union. The union has therefore failed to achieve or retain a simple majority in union membership."

13. It was not in dispute that at the time the notice was given the respondent had only 3 unionisable employees as members in the appellant's employment. That was affirmed during the hearing by **Mr. J. M. Ndolo,** the respondent's General Secretary.

14. The appellant contended that the aforesaid notice fulfilled the requirements set out at **section 54 (5)** of the **Labour Relations Act, 2007** which empowers an employer, a group of employers or employers' association to apply to the National Labour Board to terminate or revoke a recognition agreement.

As at 16th January, 2012 when the respondent was reporting the two trade disputes to the Ministry of Labour, the ninety (90) days' notice of termination of the Recognition Agreement as well as the thirty (30) days' notice to stop deduction and payment of agency fees had already lapsed.

15. The Recognition Agreement that was signed on 4th August, 2003 did not stipulate the mode of termination of the same. The agreement was to remain in force for a minimum period of 3 years. Thereafter it was to continue in force until amended or terminated. It further provided that:

"Either party wishing to amend or modify the Agreement shall give three (3) months written notice to the other party with details of the proposed amendments. In the event of it proving impossible to obtain mutual agreement to the amendment of the Agreement then either party may refer the dispute to the Minister for Labour for normal action in terms of the Trade Disputes Act Cap 234."

16. The learned trial judge held that **section 54 (1)** of the **Labour Relations Act** that was sought to be relied upon by the respondent did not provide for termination of the Recognition Agreement. He cited **sub-section (6)** that states as follows:

"If there is a dispute as to the right of a trade union to be recognized for the purposes of collective bargaining in accordance with this section or the cancellation of recognition agreement, the trade union may refer the dispute for conciliation in accordance with the provision of part VIII."

17. **Sub-section (7)** stipulates that if the dispute referred to in **sub-section (6)** is not settled during conciliation, the trade union may refer the matter to the Industrial Court. The respondent argued that it had followed that procedure.

18. The learned judge held that the appellant's termination of the Recognition Agreement without following the aforestated rigorous procedure amounted to self-help and was unlawful.

19. Although the appellant argued that the notices that it issued were in compliance with **section 54 (5)** of the **Labour Relations Act,** we do not agree that it was the appropriate method for terminating or revoking the Recognition Agreement. The appellant simply gave notices of termination of the Recognition Agreement and stoppage of deduction and payment of agency fees immediately upon expiry of the notice periods of 90 days and 30 days respectively.

20. Under **section 54 (5)** the appellant was required to

> *"apply to the Board to terminate or revoke"* the Recognition Agreement. An application is different from a notice. According to **BLACK'S LAW DICTIONARY, Ninth Edition** *"to apply"* is to *"make a formal request,"* whereas a **"notice"** is defined as a *"legal notification required by law or agreement, or imported by operation of law as a result of some fact."*

21. What the appellant simply did was to notify the respondent and the National Labour Board that upon expiry of the aforestated period(s) of time it would terminate the Recognition Agreement and stop deducting and paying Agency fees to the respondent.

22. The correct procedure was to apply to the National Labour Board to terminate the Recognition Agreement, having given the notices to the respondent. An application may be granted or rejected. The dispute resolution process as set out under part VIII would then kick in.

23. The mere fact that according to the appellant, the respondent was no longer representing a simple majority of unionisable employees in the appellant's employment did not automatically mean that the Recognition Agreement was no longer operational. The respondent's argument was that although it had only three members who were paying union dues through the check off system, there were other unionisable workers who had agreed to deduction of Agency fees and had enrolled to become members of the union. That issue required determination, before which the appellant could not unilaterally terminate the Recognition Agreement and stop deducting Agency fees.

24. Our determination of grounds 1, 2, 3, 4, 5, 6, 14, 15, 16 and 17 is therefore that the appellant's notices dated 10th October, 2011 to the National Labour Board and to the respondent were not sufficient to terminate the Recognition Agreement. We dismiss those grounds of appeal.

25. We now turn to grounds 7, 8, 9 & 10 which raise the broad question whether it was open for the learned judge to direct the appellant to enter into CBA negotiations with the respondent, deduct and remit union dues from all the unionisable employees from whom it was deducting Agency fees and remit them to the union, including dues from the three (3) employees who were all along members of the union.

26. In view of our findings regarding the first cluster of grounds of appeal, the answer to the question raised above has to be in the affirmative. **Section 57 (1)** of the **Labour Relations Act** states as follows:

> **"An employer, group of employers or an employers' organization that has recognized a trade union in accordance with the provisions of this part shall conclude a collective agreement with the recognized trade union setting out the terms and conditions of service for all unionisable employees covered by the recognition agreement."**

It follows therefore that if the termination of the Recognition Agreement was contrary to the law, the judge had to make such ancillary orders as were necessary.

27. Lastly, we shall deal with grounds 11, 12 and 13 regarding the trial court's findings that **Articles 24** and **41** of the **Constitution** had been violated. **Article 24** provides for limitation of rights and fundamental freedoms. It states, ***inter alia,*** that a right or fundamental freedom in the Bill of Rights shall not be limited except by law. The learned judge held that the appellant had violated **Article 41 (2) (C)** which guarantees every worker the right to form, join or participate in the activities and programs of a trade union.

28. The trial court also found that in view of manner in which the appellant had terminated the Recognition Agreement and stopped payment of Agency fees, the appellant had unlawfully limited the rights and freedoms of its workers. Given the circumstances of this case, that finding was valid in law.

29. In conclusion, while we agree that under **section 54 (1)** of the **Labour Relations Act, 2007** an employer can only recognize a trade union for purposes of collective bargaining if the trade union represents a simple majority of unionisable employees, the same section stipulates the mode of terminating or revoking a recognition agreement. The appellant violated the latter.

30. In the circumstances, this appeal is without merit and is hereby dismissed with costs to the respondent. It is so ordered.

DATED and Delivered at Nairobi this 10th day of March, 2017.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR.