IN THE COURT OF APPEAL

AT NYERI

(CORAM: G.B.M. KARIUKI, SICHALE & KANTAI, JJA)

CIVIL APPEAL NO. 49 OF 2016

BETWEEN

LEWA WILDLIFE CONSERVANCY.....APPELLANT

AND

KENYA GAME HUNTING & SAFARI WORKERS UNION.....RESPONDENT

(Being an appeal from the Judgment of The Employment and Labour Relations Court at Nyeri (Byram Ongaya, J.) dated 24th March, 2016)

In

E.L.R.C. Cause No.132 of 2015)

****

JUDGMENT OF THE COURT

The respondent, **KENYA GAME HUNTING & SAFARI WORKERS UNION**, the then claimants instituted suit against the appellant, **LEWA WILDLIFE CONSERVANCY**, the then respondent in the Employment and Labour Relations Court Cause No. 132 of 2015. The respondent's grievances were that a certain number of the appellants' employees (numbering 31) had authorized the appellant to deduct union dues through a check off system; that the appellant had refused to effect the deductions under the pretext that the said employees held managerial positions and hence are not unionisable. The respondents maintained that since the employees could not ***"hire and fire"*** they did not qualify to be managerial staff.

The appellant resisted the respondent's claim and in its memorandum of reply dated 1st October, 2015 and filed on 7th October, 2015, it stated that it had a total workforce of 283 employees of whom 227 are unionisable members; that the 31 employees held managerial positions and hence could not be members of the respondent's union.

The dispute therein was heard by Ongaya, J. who in a judgment dated 24th March, 2016 found in favour of the claimant against the appellant and made the following orders: -

> ***"1. The declaration that the Claimant is entitled(sic) to the respondent to deduct union dues in accordance with the law with respect to the 31 respondent's employees who have signed acknowledging to be members of the union as per the form being exhibit 5 on the statement of***

claim.

2. The respondent to deduct and deliver the union dues from the 31 employees effective end of May 2016 failing the respondent to pay all due union dues with interest at court rates with respect the 31 employees effective end of July 2013 till full payment and out of the respondent's own funds in terms of section 19(6) of Employment Act, 2007.

3.The respondent to pay costs of the suit".

The appellant was dissatisfied with the outcome and hence this appeal which was canvassed by way of written and oral highlights. In its oral highlights made before us on 6th June 2017, the appellant relied on its written submissions and its list of authorities dated 31st May, 2017. The appellant contended that the suit before the trial court (suit No, 132 of 2015) that gave rise to this appeal had been arbitrated upon in Industrial Court Cause No. 156 of 2011 and hence the suit before the trial Court was *res judicata*. Secondly, the appellant contended that parties are bound by Collective Bargaining Agreements and that although the 31 employees were not expressly excluded as non-unionisable members in the Collective Bargaining Agreement, the court erred in finding that by the non-exclusion, the 31 employees are members of the union. Thirdly, the trial Judge was faulted in defining managers as persons who can hire and fire and finally, that the respondent had failed to discharge its burden of proof as it did not provide proof that the 31 employees were unionisable by virtue of not being in managerial positions.

On its part the respondent countered the appellant's assertions and contended that managerial staff are:-

"1. Directors, managers, financial controllers and the Union Respondent Managers.

2. All the other employees are unionisable employees who cannot hire and fire".

It was the respondent's further contention that the number of 31 employees was such a large number to be in managerial positions. The appellant refuted that the 31 employees held managerial positions on the basis that the 31 could not hire and fire.

We have taken into consideration the record, the oral and written submissions of the both parties, the authorities cited and the law. The appeal before us is a first appeal and our mandate as a first appellate court was restated by this court in the decision of **Mwangi vs. Wambugu** [1984] KLR page 453 where it was held that: -

"A Court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the finding; and that an appellate court is not bound to accept the said judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demenour of a witness is inconsistent with the evidence in the case generally.

In the impugned judgment, the learned trial judge considered the issue of *res judicata* and came to the conclusion that the claim before him was not *res judicata* as "***the check off form in the present dispute were signed by the workers on or after 2nd February 2013"*** and judgment in Cause No. 156 of 2011 was delivered on 22nd August 2012. On our part, we do not deem it fit to delve into the issue as to whether the suit before the trial judge was *res judicata* or not as in our view, this appeal will turn on whether the 31 employees were unionisable or not. In arriving at the conclusion that the 31 employees are unionsable the learned judge rendered himself as follows;

"The 2nd issue for determination is whether the claimant is entitled to the deduction and payment of the union dues with respect to the 31 employees. The court has considered the material on record. There is no material before the court, such as the respondent's

organizational structure and staff establishment framework, or appointment letters or other material setting out the levels of the employees in issue so as to exclude the employees from trade union activities as envisaged in appendix C of the Industrial Charter. All the respondent has filed is the schedule dated 16th September 2015 purporting to fit the 31 employees into the managerial cadre together with job descriptions but whose maker has not been stated or brought to testify as to their relevance. The schedules, in the opinion of the court, amount to the respondent's unilateral position calculated and hoped to defeat the claimant's legitimate claim. Of great and crucial finding in this case is the finding by the court that the parties have not agreed to exclude any of the 31 employees from union activities. In the court's opinion, in furtherance of appendix C, the union and employer must show the exclusion of named or specified ranks or offices they wish to exclude from union activities. The court considers that the exclusion cannot be unilateral or automatic but for proper outcomes the parties must overly schedule in their agreement the excluded staff by name, office, rank, or such other acceptable manner. That has not been done in the present case and the court has no reason to find that the 31 members who have already joined the union were not eligible to do so".

It is common ground that the appellant and the respondent entered into a recognition and Collective Agreement. It is also not in dispute that in appendix C attached to the CBA between the appellant and the respondent the following employees were to be excluded from union representation:-

"1(i) Executive Chairman; Managing Director; General Manager (and his Deputy) and Functional Heads' i.e. Department Heads (and their Deputies).

(ii) Branch Manager (and his Deputy).

(iii) Persons in-charge of operations in an area (and their deputies).

(iv) Persons having authority in their organizations to hire, transfer, appraise, suspend, promote, reward, discipline and handle grievances provided that such person fall within the Industrial Charter Clause No. 11-1.

(v) Persons training for above positions (including understudies).

2. (i) Personal Secretaries to persons under 1 above.

(ii) Persons whose functional responsibilities are of a confidential nature as shall be agreed upon between the parties.

2. Any other category of staff who may in the case of any particular undertaking, be excluded from union representation any (sic) mutual agreement"

The appellant contended that the trial court erred in its interpretation of management personnel to be those with authority to hire and fire. It was its submissions that the 31 employees served in various roles including supervision, appraisal and discipline of other employees. It was the appellant's further contention that there was in fact an agreement between itself and the respondent on a list of its unionisable employees as specified under the 2010-2011 Collective Bargaining Agreement and attached to the CBA and marked as appendix C.

The crux of this appeal is whether the 31 employees were unionisable. In **Kenya Chemical & Allied Workers' Union vs Bamburi Cement Limited** [2017] eKLR it was stated –

"**A unionisable employee in relation to any trade union is defined under section 2 to mean only those employees who are eligible for the membership of that trade union. That definition does not sufficiently answer the question who a unionisable employee is, or even who is eligible to be a member of the union. The only feature or characteristic of a unionsable employee is that given by section 59(3) of the Labour Relations Act;**

(3) The terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement."

Suffice to state that in the absence of a definition of a unionisable employee it becomes difficult to state whether the 31 are eligible to be members of the Union. The respondent contended that they do not have the prerogative of hiring and firing. On the other hand the appellant contended that the 31 employees held positions of responsibility and hence are not unionisable. But even in the absence of that portfolio, one cannot say that this constitutes a definition of who is a unionisable member. The further argument that the number of 31 is too large as to constitute managers does not also hold sway. In our view, the respondent failed to establish that the 31 employees are unionsable members.

On the issue that the 31 employees had signed check off forms for remittance of their dues to the respondent, in our view, nothing much turns on this. In **Kenya Chemical & Allied Workers' Union vs Bamburi Cement Limited** (supra) this court stated –

"Section 52 dealing with direct payment of trade union dues, levies, subscriptions or other payments authorized by the constitution of the trade union, with respect only applies to those who are members of a trade union. The fact that the employees continued to make direct payments to the appellant was not a relevant factor in the determination of the dispute."

Having come to the conclusion that the 31 members of the appellant's staff were not unionisable members, we do not deem it necessary to consider whether the claim filed by the respondent was *res judicata*. Suffice to state that with the foregoing, we have come to the conclusion that this appeal has merits. It is hereby allowed and the judgment made by the Employment and Labour Relations Court on 24th March, 2016 is hereby set aside, the consequence whereof being that the respondents claim dated 31st July, 2015 and filed on the same day stands dismissed. The appellant shall have the costs of this appeal and costs in the court below. It is so ordered.

Dated and delivered at Nyeri this 19th day of July, 2017.

G.B.M. KARIUKI

…….....

JUDGE OF APPEAL

F. SICHALE

….....

JUDGE OF APPEAL

S. ole KANTAI

….....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR