



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO.132 OF 2015

**KENYA GAME HUNTING AND SAFARIS
UNION.....CLAIMANT**

VERSUS

**LEWA WILDLIFE CONSERVANCY.....
RESPONDENT**

(Before Hon. Justice Byram Ongaya on Thursday, 24th March, 2016)

JUDGMENT

The claimant union filed the memorandum of claim on 31.07.2015. The issue in dispute is that the respondent has failed to deduct and remit union dues for the named 31 employees who have signed the relevant authorization for the respondent to deduct union dues through the check off system. The employees are designated as accountants, technician, foremen, supervisor, wildlife researcher, adult teacher, cashier, radio operator, and security officer in field of wildlife.

The parties are in recognition and collective agreements.

The claimant's case is that the workers in issue are not part of the management because they do not have the power to hire and fire so that they are eligible to join the union.

The respondent's case is that the employees are in the management and therefore not eligible to join the union.

Parties filed a dispute with the Minister for Labour under section 62(1) of the Labour Relations Act, 2007. The dispute was not resolved hence the suit was filed in nature of a referral to the court.

The claimant has invoked appendix C to the Industrial Charter dated 14.04.1984. The appendix is a tripartite decision between the Minister, Federation of Kenya Employers and the Central Organisation of Trade Unions. In that appendix C it was agreed that the following persons shall be excluded from union representation:

1. (i)Executive Chairman; Managing Director; General Manager (and his Deputy) and Functional Heads, i.e. Departmental 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 organisations to hire, transfer, appraise, suspend, promote, reward, discipline and handle grievances provided that such persons 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.

3. Any other category of staff that may, in the case of any particular undertaking, be excluded from union representation by mutual agreement.

The conciliator appointed by the Minister returned that union dues cannot be deducted from employees perceived, deemed and found to belong to the management cadre. The claimant was dissatisfied and the dispute was referred to the court by the claimant.

The respondent filed the memorandum of response on 07.10.2015. The respondent's case is that the employees in issue are not unionisable, they hold management positions, they have many staff working under them who they supervise and they have power to discipline as per appendix c of the Industrial charter.

It is not in dispute between the parties that the collective agreement recognises appendix C of the Industrial Charter so far as eligibility of employees to join the union is concerned.

The **1st issue** for determination is whether this suit is *res judicata* in view of the findings of the court in cause No. 1567 of 2011 between the parties. The judgment in that case was rendered on 22.08.2012. The checks off forms in the present dispute were signed by the workers on or after 02.07.2013. Obviously, the deduction in issue was therefore not subject to that earlier cause between the parties.

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 organisational 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 16.09.2015 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 overtly 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.

The material before the court is the evidence by the claimant that the 31 employees have signed confirming that they are members of the claimant union and the respondent should deduct union dues accordingly. Thus, there is nothing before the court to act as a bar to the claimant's prayers. The court finds that the claimant has satisfied section 48 and in particular sub-section 48 (3) of the Labour Relations Act, 2007 and is entitled to the union dues as prayed for. Thus, the claimant's case will succeed.

In conclusion, judgment is entered for the claimant against the respondent for:

1. The declaration that the claimant is entitled 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 to the 31 employees effective end July 2013 till full payment and out of the respondent's own funds in terms of section 19(6) of the Employment Act, 2007.
3. The respondent to pay costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Thursday, 24th March, 2016**.

BYRAM ONGAYA

JUDGE