



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**  
**CAUSE NO. 19 OF 2013**

*(Before Hon. Lady Justice Maureen Onyango)*

**KENYA UNION OF SUGAR PLANTATION**

**AND ALLIED WORKERS .....CLAIMANT**

**-Versus-**

- 1. MUMIAS SUGAR COMPANY LIMITED**
- 2. NZOIA SUGAR COMPANY LIMITED**
- 3. SOUTH NYANZA SUGAR COMPANY LIMITED**
- 4. CHEMELIL SUGAR COMPANY LIMITED**
- 5. MUHORONI SUGAR COMPANY LIMITED**
- 6. WEST KENYA SUGAR COMPANY LIMITED**
- 7. KIBOS SUGAR COMPANY LIMITED .....RESPONDENT**

**JUDGEMENT**

The Claimant is a Trade Union registered to represent workers in Sugar Plantations and allied Industries. The Claimant has recognition agreements with all 6 Respondents whose unionisable employees it represents. The 2nd, 3rd, 4th and 5th Respondents signed a joint recognition agreement while the 1st, 6th and 7th Respondents signed individual recognition agreements with the Claimant Union.

The issue in dispute is the refusal of the Respondents to include management staff as members of the union. In the Memorandum of Claim filed by the Claimant Union it avers that the parties reached a deadlock during conciliation and a certificate was issued by the conciliator allowing the dispute to proceed to court.

The Claimant states that management staff who are not represented by the claimant applied for registration of a trade union to represent them. The trade union to be known as KENYA SUGAR INDUSTRIES MANAGEMENT STAFF UNION was denied registration by the Registrar of Trade Unions on advice of the National Labour Board. The reason for denial of registration was that;

***"There are already registered trade union, sufficiently representative of the whole or of a substantial proportion of the interests in respect of which the applicants sought registration namely KENYA UNION OF SUGAR PLANTATION AND ALLIED WORKERS UNION"***

The Claimant Union submits that it convened a meeting of its National Executive Board who passed a resolution among others, to amend the recognition agreement to include management staff on its membership. That the Claimant sought a meeting with the Respondents to discuss the matter but the Respondents declined to attend the meeting following which the claimant reported the dispute.

The Claimant submits that the Management Staff have a right to belong to a trade union of their choice under Article 41 of the Constitution, section 4 of the Labour Relations Act and ILO convention No.87 and 98.

The Claimant prays for the following orders:-

1. The Claimant prays for the Court of Equity to give directions which in effect will allow members of Management staff to join associate and participate in the activities of the Union without any restrictions whatsoever.
2. That the Recommendations of the National Labour Board and the Registrar of Trade Unions be taken into account and respected/upheld.
3. The Respondents to pay the Claimants costs of the Suit.

The Federation of Kenya Employers filed Response on behalf of the 1st, 2nd, 3rd, 4th and 5th Respondents. The 6th Respondent filed its Reply to the Memorandum of Claim through the firm of Ogejo, Olendo & Co. Advocates while the 7th Respondent filed its Reply through Otieno, Yogo Ojuro & Co. Advocates.

### **Response of the 1st, 2nd, 3rd, 4th and 5th Respondents**

The 1st to 5th Respondents denied that the application for registration of a trade union for the management staff was tantamount to an application to join the Claimant Union or that the National Labour Board ever advised the Claimant to amend its constitution and to recruit management staff. They contend that neither the Registrar of Trade Unions or the National Labour Board have any role to advise the Claimant or any other party to amend its constitution and recognition agreement. They further contend that the Claimant has misconstrued the provisions of Article 41 of the Constitution to mean all workers have an absolute right to be unionised without limitation and that the right is applicable directly between private parties.

The 1st to 5th Respondents submitted that;

- a. Article 41 (2) (c) of the Constitution that provides for every worker's right to form, join or participate in the activities and programmes of a trade union is subject to limitation. The main purpose of trade unions is to ensure workers achieve decent wage and working conditions through a collective process. This collaborative voice allows workers to express their views, which they may be too intimidated to do alone. However, the right to form, join or participate in the activities of a trade union is not an absolute right to be enjoyed without limitation.
- b. Under Article 24 of the Constitution, rights and freedoms in the Bill of Rights can be limited. Article 24 of the Constitution provides that *"(1) A right of fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-- (a) the nature of the right or fundamental freedoms; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the need to ensure that the enjoyment of rights and fundamental*

freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

c. It is in the interest of maintaining sound industrial relations that the Respondents' management staff who represent the employers at the companies are not members of a trade union. The Industrial Relations Charter defines the obligations of the employer, the employee, and the government on industrial relations. Under Clause 11 of the charter and Appendix "C" 1 (iii), the parties agreed on the level of union representation. Clause 11 of the Charter provides as follows;

*The following will be excluded from Union representation: (a) persons who are formulating, administering, co-ordinating, and/or controlling any aspects of the organisation's policy. (b) Staff who perform work of a confidential nature as shall be defined by a Tripartite Committee. (c) Any other category of staff who may in the case of any particular undertaking, be excluded from Union representation by mutual agreement.*

d. Appendix "C" 1 (iii) of the Industrial Relations Charter reflects the parties' agreement on those employees who are restricted from union representation. This includes inter alia *"Persons in-charge of operation in an area (and their Deputes) and Persons whose functional responsibilities are of a confidential nature as shall be agreed upon between the parties."*

e. The spirit behind Clause 11 and appendix C of the Industrial Relations charter is reflected in section 2 of the Labour "Relations Act which provides that *"Industrial Relations Charter" means a tripartite agreement between the Government, the most representative employers' organisation, and the most representative employees organisation for the regulation of Labour and Industrial relations in Kenya; and "unionisable employee" in relation to any trade union means the employee eligible for membership of that trade union."*

f. Thus, the Labour Relations Act & the Industrial Relations Charter enable parties to determine who is eligible to join and participate in the activities of a trade union through constitution and mutual agreement. Consequently, the right of management employees to join and participate in the activities of trade unions may be limited by the agreement between the parties. It would be against the spirit of the Labour Relations Act and the Industrial Relations Charter if the Respondents' management staff are allowed to join and participate in the activities of the Claimant union.

g. The importance of the Industrial Relations Charter as the Cornerstone of Industrial relations in Kenya has been upheld by the Courts. In the case of **Kenya Game Hunting and Safari Workers Union Versus Lewa Wildlife Conservancy-Industrial Cause No.1567 of 2011** -the Court at page 4-5 held that *"The Industrial Relations Act is a product of tripartite engagement. It is the glue that has bound Employers, Employees and the Government for the life of the Republic of Kenya. The charter has been used widely by the stake holders in meditating the parameters of Industrial relations. It has widely been applied by the Industrial Court in defining the rights and obligations of parties. Through its wide acceptance, it has become a cornerstone of Industrial Jurisprudence."*

h. The Respondents are corporate entities and therefore not living persons capable of running and managing business enterprises the way living persons would. Consequently, they require human agents to formulate and implement policies which promote their business interests.

i. The business interests of the Respondents are championed by the management staff who perform functions that affect the control and direction of the business. They have the authority to independently make key business decisions on most issues. For example, they formulate the employer's approach to Collective Bargaining Wage negotiations and therefore often possess sensitive and confidential information.

j. The Respondents' business interests would be prejudiced greatly if management employees are allowed to join and participate in the activities of the Claimant union. There is a grave possibility of conflict of interest arising to the detriment of the employer's business interest if management employees are allowed to join trade unions.

k. In the case of **Aviation & Allied Workers Union Versus Kenya Civil Aviation Authority, Industrial Cause No.35 of 2011** the court at page 5-7 held that *"We agree with the respondent that unionizing them would lead to a serious conflict of interest in the performance of their duties. As union members, they will be required to champion the union's interests to the detriment of the respondent's interests which they are expected to protect as branch managers..... the limitation of the management staff's right to join trade unions is justified under article 24 of the Constitution. It is a limitation that is justifiable in an open and democratic society as it considers the interests of both the employer and the employees. The purpose of the limitation is to give the employers representation and sufficient manpower to protect its interests at the workplace. The relationship between labour and capital is inherently adversarial and if all employees are allowed to be unionized, the employers will suffer."*

l. During negotiations, management employees represent the interest of their employer while union representatives represent the interest of unionisable employees. If the Respondents' management staff are allowed to sit at the negotiating table on the side of the Claimant union, it would defeat the very purpose of collective bargaining since there would be no party to represent the employer's interests.

m. In the case of **Kenya Games Hunting and Safari Workers Union Versus Lewa Wildlife Conservancy-Industrial Cause No.1567 of 2011** - the Court at page 6 held that *"There will always as subordinate, midlevel management and management staff. Not all can entirely be in management or in the trade union. although the constitution guarantees the right to every employee, including those in management to belong to a trade union, the restriction on management staff in exercise of this right is a reasonable restriction. It would not be possible to negotiate collective agreements for example if management staff sat on the same side with trade union leaders at the collective bargaining forum. The exercise of the right to belong to trade unions by management staff would stunt the right of collective bargaining. Restriction is therefore reasonable on a democratic society."*

n. The Respondents further submit that the Recognition Agreement between the Respondents and the Claimant union sets out the level of representation. The said Recognition Agreement is yet to be amended by the parties.

o. The Respondent further submits that the purported recommendation of the National Labour Board the Respondents' management staff join the Claimant union is without regard to the fact that the rights under Article 41 of the Constitution are not absolute. The said recommendation did not consider the business interests of the Respondents in maintaining control and managerial interest over their business vis-a-vis the interest of the employees in reaping maximum benefits from the business through collective bargaining.

They pray that the dispute filed by the Claimant be dismissed with costs.

## **6th Respondents Reply**

In its response to the Claim the 6th Respondent states that the Claimant does not have *locus standi* to represent its management staff as none of them has joined the Claimant's membership and the claim as filed is not a representative suit. The 6th Respondent further states that the recognition agreement between it and the claimant has not been amended to bring on board management staff and that none of its management staff was involved in the application for registration of the proposed Kenya Sugar Industries Management Staff Union, that the Claimant does not have a cause of action against the 6th Respondent. It further submits that Article 24 of the Constitution and its recognition agreement with the

Claimant limits the rights of Management staff to join a union due to the nature of their work.

The 6th Respondent submits that the suit filed by the Respondent is totally defective as it does not comply with Rules 4, 5, and 14 of the Industrial Court (Procedure) Rules 2010, that there is no report or certificate of conciliation on record and that the verifying affidavit is signed by a stranger with no authority to swear the affidavit on behalf of the claimant or its members. The 6th Respondent prays that the claim against it be dismissed.

### **Response to 7th Respondent**

The 7th Respondent raises similar issues as those raised by the 6th Respondent and further states that the claimant has not recruited any of its management staff or met the threshold for recognition. The 7th Respondent further contests the jurisdiction of this court, and submits that the claimant is non suited. It prays that the claim against it be dismissed with costs.

The case was heard by way of oral submissions. Mr. John Otieno Ogutu, the Deputy General Secretary for the Claimant appeared on behalf of the Claimant and Ms. Oyombe Advocate appeared for the 1st to 5th Respondents. There was no appearance for the 6th and 7th Respondents although they had been properly served with the hearing notice. The 1st to 5th Respondents also filed written submissions.

Mr. Ogutu reiterated the submissions of the claimant as contained in the memorandum of claim. He submitted that the Respondents are represented in the National Labour Board whose mandate includes advising the minister on all matters concerning labour relations and trade unionism among others. He submitted that Article 41 of the Constitution and section 4 of the Labour Relations Act give freedom to any worker to become a member of a trade union and that the right can only be limited by legislation and is not automatic.

For the 1st to 5th Respondents Ms. Oyombe relied on and reiterated the Respondent's written submissions in which the 1st to 5th Respondents submit that;

The claim as filed offends the provisions of **Article 41 of the Constitution** on fair labour practices, sections 2, 54 (1), 74(b) of the Labour Relations Act 2007 and the Industrial Relations Charter on union representation.

The Respondents submit that their engagement with the Claimant is pursuant to the various recognition agreements entered into between the Claimant and the Respondents where the scope of the Claimant's representation of the Respondents employees is limited to *unionisable staff excluding: management, supervisory and staff handling confidential information* as defined in the Industrial Relations Charter.

The 1st to 5th Respondents submit that the Claim as filed offends the core principles in industrial relations and employment engagement by purporting to represent Management staff who are senior managers and supervisors mandated to protect the interest of the Respondents in all matters industrial, labour and employment with the Claimant thus the Claim denies the Respondents the protection envisaged in the Constitution, the Industrial Relations Charter and the Labour Relations Act 2007 as well as the Employment Act 2007.

The Respondents relied on **Industrial Court Causes of: Kenya Game Hunting & Safari Workers Union -Vs- Lewa Wildlife Conservancy Limited Cause No.1567 of 2011 and Aviation & allied Workers Union -Vs- Kenya Civil Aviation Authority Cause No.15 of 2011** where the Judges in the two cases stated that: "**The interests of the employer are championed by management staff whose duties involve supervision of other staff, discipline, control and recommendation of staff promotion among others....**

**That article 41 of the Constitution is subject to the limitation provided under Article 24 of the Constitution. The restriction of management staff to join unions is a reasonable restriction and the participation of trade unions in management of companies cannot extend beyond that which is**

**agreed between the parties under their recognition agreement and the CBA. The managerial prerogative is a fundamental principle in capitalist production, it must be protected. The purpose of the limitation for management staff is to give the employers representation and sufficient manpower to protect their interests at the work place.'**

The Respondents submit that the Claim offends the provisions of section 2 of the Labour Relations Act 2007 which provides as follows:

**"Industrial Relations Charter"** means a tripartite agreement between the Government, the most representative employers' organisation, and the most representative employees' organisation for the regulation of labour and industrial relations in Kenya;

**"recognition agreement"** means an agreement in writing made between a trade union and an employer, group of employers or employers' organisation regulating the recognition of the trade union as the representative of the interests of unionisable employees employed by the employer or by members of an employers' organisation;

**"unionisable employee"** in relation to any trade union means the employees eligible for membership of that trade union.

The Respondents submit that the Claim offends the provision of section 54 (1) of the Labour Relations Act 2007 which provides as follows:

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

The Respondents submit that the Claim offends the provision of the **Industrial Relations Charter** which is the foundation of Industrial relations in Kenya under the International Labour Organization's tripartite arrangement between Government, Workers and Employers which makes the following provisions with regard to the level of union representation:

**"LEVEL OF UNION REPRESENTATIVE as follows:** At a meeting chaired by the Minister of Labour and attended by representatives of the Federation of Kenya Employers and Central Organisation of Trade Unions (K) 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 - that is - Departmental Heads (and their Deputies).
- (ii) Branch Manager (and his Deputy)
- (iii) Persons in-charge of operation 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 Relations 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 who may, in the case of any particular undertaking, be excluded from union representation by mutual agreement."

The Respondents further relied on **Banking Insurance and Finance Union (K) v Standard Chartered Bank of Kenya Ltd [2013] eKLR** attached as **Appendix D** where Honourable Lady Justice Linet Ndolo while making a finding on union representation had this to say:

*"I will now address the issue of the Claimant's locus standi to represent the second Grievant. The second Grievant admitted in cross examination that his position was non-unionisable and he was therefore not covered by the Collective Bargaining Agreement between the Claimant on behalf of its members and the Respondent..."*

*The Claimant submitted that since the Respondent had settled cases of other grievants whose positions were non-unionisable, then the Respondent was estopped from raising the issue of locus standi at the stage. I respectively disagree. Categorisation of employee positions into unionisable and non-unionisable cadres is clear and predictable. It cannot be that just because a non-unionisable employee is terminated alongside unionisable employees then his status changes. **It also cannot be that just because parties operate in error out of court, then the Court is called upon to give its seal of approval to that error. The Court must always operate within the four corners of the law. I therefore find that the second Grievant was a non unionisable employee and could not access the benefits of the Collective Bargaining Agreement as his terms and conditions of service were governed by a different arrangement.***

*"As held by Nzioki wa Makau J in **Kenya Chemical & allied Workers Union Vs Polypipes Ltd (Industrial Court Cause No.1112 of 2012)***

*"the only way a union has locus is when it represents a party who is its member." By virtue of his position, union membership was not available to the second Grievant and he could not therefore have been a member of the Claimant union. The logical conclusion then is that the Claimant Union had no capacity to bring a claim on behalf of the second Grievant and to that extent; the claim was incompetent ab initio. Ultimately, the second Grievant's claim fails and is dismissed."*

The 1st to 5th Respondents submits that Appendices 1 and 2 of the Respondents list of additional documents filed in Court on 18th March, 2014 contains the list of all management staff of the Respondents with copies of their substantive job descriptions clearly detailing their management roles.

The Respondents submits that the Claimant has not made any attempt in the pleadings to specify the category of employees to be included into the unionisable categories to be represented by the Claimant which request will be subject to negotiations between the Respondents and the Claimant.

## **Determination**

The issue arising for determination from the pleadings and submissions herein are the following:-

- 1. Whether this court has jurisdiction to determine this claim.**
- 2. Whether the Claimant has locus standi to present this claim on behalf of the management staff.**
- 3. Whether the Claim is totally defective.**
- 4. Whether the Claimant is entitled to represent management staff of the Respondents.**
- 5. Whether the Claimant is entitled jurisdiction.**

The jurisdiction of this court has been contested by the 7th Respondent who argues that the claim by the union concerns interpretation of the constitution which is a preserve of the High Court.

As was stated by Nduma J in **Nick Githinji Nduchu v clerk, Kiambu County Assembly and**

**another[2014]eKLR**, the issue of jurisdiction when raised must be determined at the outset. This was also the holding of the court of appeal in the case of **Owners of the Motor Vessel Lillian "S" v Caltex Oil Kenya Limited [1989]KLR** where the court stated;

"without jurisdiction a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for confirmation of proceedings pending before it. A court of law downs its tools in respect of the matter before it the moment it hold the opinion that it is without jurisdiction."

I must however state that the issue of Jurisdiction as raised by the 7th Respondent is in my opinion now a tired argument as it has been raised and determined enough times by both this court, the High Court and even the Court of Appeal I would be justified in stating that it is now a well settled matter.

In **United States International University (USIU) v Attorney General [2013]eKLR Majanja J** stated as follows:-

*"In light of what I have stated, I find and hold the Industrial Court as constituted under the Industrial Court Act, 2011 as a court with the status of the High Court is competent to interpret the constitution and enforce matter relating to breach of fundamental rights and freedoms in matters arising from disputes falling within the provision of section 12 of the Industrial Court Act, 2011."*

This decision was cited with approval by the Court of Appeal, at Nairobi in **Civil Appeal No.6 of 2012 Prof. Daniel N. Mugendi v Kenyatta University & 3 others**. I will leave the matter to rest.

### **Locus Standi**

The 6th and 7th Respondents have argued that the Claimant does not have Locus Standi to bring this suit on behalf of the Management Staff as the Claimant does not have any members among the staff of the 6th and 7th Respondents.

The Claimant submitted among its list of documents check-off forms of employees of the 1st, 2nd, 4th, 5th and 6th Respondents' whom it alleges are management staff. No check-off forms were submitted in respect of the 3rd and 7th Respondents which may be proof that none of the management staff of the 4th and 7th Respondents have joined the membership of the Claimant. None of the other Respondents have denied that the names in the check-off forms are for management staff of their various organisations.

Since membership of the management staff would boost the membership of the Claimant Union and come with the attendant membership and monthly subscription fees if granted, I find that the Claimant has a justiciable interest in the management staff of the Respondents joining its membership and it therefore has locus standi to bring this suit which is seeking to extend and expand its membership. I therefore find that the Claimant has locus standi to bring this suit against the Respondents.

### **Whether the Claim fatally Defective**

The 6th and 7th Respondents have pleaded that the Memorandum of Claim is fatally defective as it does not comply with Rules 4, 5 and 14 of the Industrial Court (Procedure) Rules 2010, that there is no report of conciliation and certificate from the conciliator, that the affidavit verifying the claim is sworn by a stranger with no authority of the claimant. I do not think these issues would render the claim fatally defective. They are all matters of procedure and should ideally have been raised as preliminary issues before the claim. However, even had they been raised as preliminary issues they would still not sustain an argument to make the claim herein fatally defective: Under both Article 159(2) (d) of the Constitution and section 20(1) of the Employment and Labour Relations Court Act, this Court is enjoined to administer substantive justice without undue regard to technicalities.

I find the omissions or defects in the pleadings not sufficient to render the claim fatally defective.

## **Whether the Claimant is entitled to represent Management Staff**

The rights of a Union to represent employees stem from its constitution and recognition agreement. The Labour Relations Act provides at the First Schedule thereto that the Union must provide in its constitution the objects for which it is registered. Section 54 of the Labour Relations Acts further provides for recognition of a trade union which has attained membership of a simple majority of unionisable employees. The section provides at 54(4) for a model recognition agreement.

Trade Unions are further bound by the Industrial Relations Charter, a tripartite agreement providing for the tripartite roles of the Government represented by the Minister responsible for Labour matters, the workers represented by the Central Organisation of Trade Unions of Kenya (COTU (K) and employers represented by the Federation of Kenya Employers. Appendix of the Charter sets out level of Union representation as follows;

- (a) Persons who are formulating, administering, co-ordinating, and/or controlling any aspects of the organisation's policy.*
- (b) Staff who perform work of a confidential nature as shall be defined by a Tripartite Committee.*
- (c) Any other category of staff who may in the case of any particular undertaking, be excluded from Union representation by mutual agreement.*

The Claimant has submitted that it convened a meeting of its Branch secretaries which resolved to amend its constitution and recognition agreements to include membership of the Union by including management staff. The Union has not confirmed whether or not it has amended the constitution as at the time of filing this claim. No copy of the constitution has been availed to the court to confirm if the constitution now permits membership by the Management Staff.

The Recognition agreements signed by the Claimant with all the Respondents provides for membership as follows:-

*"The Management affords full recognition to the Union as a properly constituted and representative body and the sole labour organisation representing the interests of workers who are in the employment of the company in all negotiable matters signed by both parties in their collective bargaining agreement, **with the exception of Management Supervisory and confidential staff** who, for the purpose of this Agreement, shall be defined as specified in the Industrial Relations Charter."*

Besides the foregoing, the only reason given by the Claimant for demanding the inclusion of the management staff in the recognition agreement is that the National Labour Board and the Registrar of Trade Union declined to register the Sugar Industry Management Staff Union on grounds that there exists a Union (the Claimant) which is sufficiently representative of the employees of the sector. I do not understand that to mean that the National Labour Board and Registrar of Trade Unions gave the green light to the Union to register management staff who were not covered by either its constitution or the recognition agreements the claimant had entered into with the Respondents. The National Labour Board and the Registrar of Trade Unions do not confer jurisdiction to trade unions. They only approve or reject applications. Jurisdiction of trade unions is conferred by their respective constitutions and by law.

The other ground cited by the Claimant is that the Management staff have a right under Article 41 of the constitution and section 4 of the Labour Relations Act. There are not matters for the Union to hang on to as those sections do not expand the jurisdiction of the Union. It is not that the only means through which the management staff can be unionised is through a Union that has no capacity under its constitution and recognition agreements which it has signed with the employers of the management staff.

I agree with the Respondents argument that Article 41 is not absolute and can be limited as was stated by the court in **Cause No.35 of 2011 Aviation and Allied Workers Union v Kenya Civil Aviation**

**Authority (Supra)** in which the court agreed with the limitation of management staff rights to join trade unions. The same issue was the subject of **Cause No.1567 of 2011 Kenya Game Hunting and Safari Workers Union v Lewa Wildlife Conservancy** where the court stated that not all staff can be in management or in the Union although the constitution guarantees the right to form, join and participate in trade Union activities. The court stated that the restriction is reasonable in a democratic society as allowing management staff to join trade unions and sit on the same side with union leaders on the negotiation table would stunt such negotiations.

The foregoing notwithstanding any of the management staff dissatisfied with the decision of the Registrar of Trade Unions had the option to appeal against

the decision as provided under section 30 of the Labour Relations Act but the applicants did not opt to appeal. The remedy of the management staff did not therefore lie with the Claimant Union. Under article 22(2) of the Constitution, the Union has no capacity to act on behalf of management staff as they have capacity to pursue their Constitutional rights.

I have looked at the job descriptions of the management staff who signed the check-off and although most of them are excluded by virtue Appendix C to the Industrial Relations Charter, there may well be some grades that parties can agree to become unionisable. However the Claimant would have to look at each category and make an argument for the specific category that it may propose to be unionised. Insisting on Unionisation of all management staff without exception as demanded by the Union is not an option as I have already stated above.

For these reasons I find and hold that the Claimant has not proved that it has an omnibus right to represent all management staff without exception as prayed for.

### **Remedies**

Having failed to prove its right to represent management staff, I find that the Claimant is not entitled to any of the remedies sought in the claim. The result is that the claim is dismissed. Each party shall bear its costs.

**Dated and signed and delivered this 15th day of September, 2016**

**MAUREEN ONYANGO**

**JUDGE**