REPUBLIC OF KENYA

INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 2437 OF 2012

KENYA GAME HUNTING & SAFARI WORKERS

UNION ……CLAIMANT

-VERSUS-

MICATIO SAFARIS ……..……..……RESPONDENT

Mr. Ndolo for the Claimant union.

Mr. Obura for the Respondent.

JUDGMENT

This claim was filed on 3rd December, 2012 wherein the Claimant seeks the following reliefs;

1. *The court to award the Claimant's members as per the Claimant's proposal of the review of the Collective Bargaining Agreement (CBA);*

2. *The Respondent be ordered to pay union dues from when they stopped the Agency Fee and the union dues;*

3. *The Respondent be restrained from terminating the Recognition Agreement.*

The Claim is founded on the following alleged facts;

The Claimant and the Respondent have a Recognition Agreement following an order of the Industrial Court and the same was signed on 14th August, 2003.

That the parties have concluded CBA's every two years since the date of the Recognition Agreement.

That on 30th March, 2011, the Claimant made proposals to the Respondent to review the CBA that was due to expire on 30th April, 2013.

The Respondent failed to make counter proposals and to negotiate.

On 30th March, 2011 the unionisable employees who were not members of the union signed a check-off system to convert their agency fee to union dues effectively becoming members. That the check-off was

sent to the Respondent who failed to implement the same.

On 24th August, 2012, the Claimant reported a trade dispute to the Minister for Labour on the following issues;

a. Minimum wage.
b. General wage increase.
c. House allowance.
d. Overtime for driver guides.
e. Dismissal.
f. Leave travelling allowance.
g. Medical treatment.
h. Death of the employees.
i. Long service wage increase.
j. Driver guides per diem allowance.

On 26th September, 2012, the Minister accepted the dispute and appointed a conciliator.

The conciliator held a meeting on 23rd October, 2012 and requested for submissions from the parties on the dispute which the parties proceeded to do.

In the main, the dispute was not resolved because the management refused to negotiate the issue in dispute stating that they suspended the Recognition Agreement which they had entered into with the union simply because the union had lost its entire membership in their employment.

The union maintained as they did in court that they had three members who were paying union dues through the check-off list while other unionisable workers were being deducted Agency Fees in line with the law.

The union further states that the unionisable members had since enrolled as members and had signed check-off list forms which were duly forwarded to the employer.

Upon hearing both parties the conciliator found as follows;

The Recognition Agreement concluded on 4th August, 2003 was in place. Parties had successfully concluded six CBAs.

The employer unilaterally and without consulting the three members and the union discontinued deducting the union dues and remittance contrary to the wishes of the union and the three union members.

That the employer's action violated freedom of association, assembly and Collective Bargaining as enshrined under ***Article 41*** of the Constitution of Kenya 2010 and ***Section 4*** of **Labour Relations Act, 2007** and the relevant ILO Conventions of the three (3) workers.

The conciliator also chided the employer for declining to implement the check-off list from unionisable employees who had recently opted to join the union instead of continuing to pay Agency Fees.

In particular, the conciliator found that the unilateral decision to suspend the Recognition Agreement was unlawful and of no effect.

The recommendations by the conciliator were as follows;

1. *Parties to conclude the CBA.*
2. *Employer to deduct union dues from all the employees who had joined the union; and*

3. *Reinstate deduction of union dues from the existing members*

The Respondent filed a Memorandum of Response dated 15th March, 2013 on 18th March, 2013 wherein it denies that its name is "***Micato Safaris***" as cited in the suit stating that its proper name is **Mini – CABS & TOURS COMPANY LIMITED** trading as **MICATO SAFARIS.**

Respondent admits that it recognised the Claimant vide a court order in **Cause No. 69 of 2001** and a Recognition Agreement was signed in 2003.

That at the time the Claimant had achieved 50 plus one membership of the unionisable employees.

That between 2003 to 2006, the figure of employees in the union declined to three (3) which fact is admitted by the Claimant union.

That in September, 2010 Claimant served the Respondent with a Gazette Notice No. 11212 requiring Respondent to deduct Agency Fee from the wages of unionisable employees and pay it to the Claimant.

The Respondent reluctantly obeyed the notice and deducted Agency Fees from thirty six (36) unionisable employees.

By October, 2011, membership of the union remained at three (3).

By a letter dated 10th October, 2011, the Respondent gave both the Claimant and the National Labour Board 90 days notice of its intention to terminate the Recognition Agreement due to fall of membership.

At the same time the Respondent gave the Claimant thirty (30) days notice of its intention to stop deducting and paying Agency Fees in respect of the non-unionisable employees.

The Claimant objected to the notice. The events that followed are common cause as described by the Claimant.

The Respondent also disputed that seven (7) of the employees in respect of whom the check-off lists were submitted were still in its employ.

The Respondent further declined to negotiate a new CBA. This led to the report of dispute to the Ministry of Labour on 16th January, 2012.

The court has isolated the following issues for determination;

1. Whether the termination of the Recognition Agreement by the Respondent was lawful;

2. Whether refusal to deduct union dues from unionisable employees upon stopping deducting of Agency Fee was lawful;

3. Whether refusal to negotiate a new CBA was lawful; and

4. What remedies if at all are available to the claimant?

The Law

Issue I

The Respondent has submitted that under ***Section 54 (1)*** of the **Labour Relations Act No. 14 of 2007**, the Respondent was obliged to recognise the Claimant if the Claimant had obtained a simple majority of the unionisable employees of the Respondent as its members. That since the number of members had

fallen below this threshold it had no obligation to sustain the recognition, hence its decision to suspend it upon giving the notice.

The copy of the Recognition Agreement before court signed on 4th August, 2003 has a "*Modification To and Termination of this Agreement*" Clause 4 which reads;

"This Agreement shall come into force on the day of and shall continue in force for a minimum period of Thereafter the Agreement shall continue in force until amended or terminated."

Neither of the parties made submissions regarding this clause however on the face of it, the clause does not provide a manner or procedure of termination.

The copy provided to the court has handwritten information that it came into force on 28th may, 2003 and was to be in force for a minimum of three (3) years. If that is the correct position, then the Agreement has been in force for a period of about nine (9) years.

The procedure for the amendment under Clause 4 reads thus;

"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 Dispute Act Cap 234."

Going by this clause, it follows that the more drastic action of termination could not be subjected to a lesser vigorous procedure than modification.

It is the court's considered opinion that the termination had to be by mutual agreement failing which a dispute had to be reported to the Ministry of Labour for reconciliation, failing which the matter of termination would have to be determined by the court upon issuance of a Certificate of unresolved dispute.

Section 54 (1) sought to be relied upon by the Respondent does not provide for termination of a Recognition Agreement but only provides a threshold upon which Recognition could be enforced.

In particular ***Section 54 (5)*** specifically provides;

"An employer, group of employers or employers' association may apply to the Board to terminate or revoke a recognition agreement."

Whereas ***sub-section 6*** provides;

"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."

This the Claimant did by reporting the dispute accordingly and ***sub-Section 7*** provides;

"If the dispute referred to in subsection (6) is not settled during conciliation, the trade union may refer the matter to the Industrial Court under a certificate of urgency."

This is the reason the matter is before this court. It is the court's decision that the termination of the Recognition Agreement by the Respondent without following this rigorous procedure amounted to self-help and was unlawful. The termination was therefore null and void *ab initio* and the same is revoked by the court forthwith.

This finding by the court has the consequence that the refusal by the Respondent to negotiate a new CBA

was unlawful and in violation of ***Section 57 (1)*** of the Labour Relations Act which provides;

"57 (1) An employee that has recognised a trade union in accordance with the provisions of this part shall conclude a collective agreement with the recognized trade union setting out terms and conditions of service to all unionisable employees covered by the recognition agreement."

Accordingly, the Respondent is directed to commence negotiations to conclude the pending CBA and in any event, the said negotiations to commence within thirty (30) days from the date of this judgment.

Regarding the refusal by the Respondent to deduct union dues from all the unionisable employees from whom it was deducting Agency Fees and remit to the union, the Respondent is directed to commence such deductions immediately and in any event from the next salary from the date of this judgment.

The Respondent is equally directed to continue deducting and remitting union dues from the three (3) employees who were previously in the union and still continue to be members.

It is pertinent to note that the freedom of association of employees is guaranteed under **Article 41** of the Constitution of Kenya, 2010.

In this regard ***Article 41 (1)*** provides every person has the right to fair labour practices whereas sub-article 2 provides;

"Every worker has the right –

a. **to form, join or participate in the activities and programmes of a trade union."**

This right is not to be taken lightly by the employer and its violation would attract serious sanctions from the court.

Whereas rights and freedoms in the Bill of Rights are not absolute, derogation must be strictly in terms of ***Article 24*** of the Constitution and in any event *"A right or fundamental freedom in the Bill of Rights shall not be limited except by law…."* The Respondent purported to limit the rights and freedoms of its workers in blatant violation of statutory provisions referred to earlier. The application by the Claimant succeeds accordingly with costs to be paid by the Respondent.

Dated and delivered at Nairobi this 20th day of November, 2013.

MATHEWS N. NDUMA

PRINCIPAL JUDGE