REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 1567 OF 2011

BETWEEN

KENYA GAME HUNTING AND SAFARI

WORKERS UNION ….....……. CLAIMANT

VERSUS

LEWA WILDLIFE CONSERVANCY LIMITED …….. REPONDENT

ISSUE IN DISPUTE: LEVELS OF TRADE UNION REPRESENTATION

AWARD

1. This claim was filed by the claimant trade union on 14th September 2011. The claimant represents the Wildlife Conservancy Industry. Lewa Wildlife Conservancy Limited is a company that is involved in wildlife conservancy. The parties have a recognition agreement, and have concluded several collective bargaining agreements. The dispute has its genesis in clause 2 of the current CBA which states, 'the *terms and conditions set in this agreement shall cover all unionisable employees as per the Industrial Relations Charter which defines unionisable employees.'*

2. The respondent filed its statement of reply on 2nd March 2012 through Mr. A.O. Ambenge, Senior Executive Officer of the Federation of Kenya Employers [FKE]. The dispute was argued by Mr. Ambenge and Mr. J. M. Ndolo General Secretary of the claimant, on 12th March 2012. The Court advised the parties that the Award would be delivered on notice. There has been a considerable delay in preparing and delivering the Award. This was occasioned by the problems relating to the transition of the Industrial Court under the new Constitution. Delay is regretted.

3. The claimant stated that the respondent employs unionisable and managerial staff. In the statement of claim, the managerial employees are named as: the CEO; Deputy CEO; Chief Security Managers; Chief Conservation Managers; Chief Administration Managers; Research Programme Managers; Development Programme Managers; Development Programme Managers; Human Resource Managers; Donor Managers; and Marketing Managers. These 10 officers were listed as being in management and not eligible for trade union representation. The claimant stated that secretaries to the Managing Director and the Deputy Managerial Directors are unionisable, but the parties agreed they be considered as part of management, because they hold dockets that call for high degree of managerial confidentiality. They enjoyed better salaries than other unionisable employees.

4. The claimant went on to list another group of 35 employees. It was not clear whether these represented the entire face of the Lewa organogram. A reading of the statement of claim does not suggest what was

meant to be conveyed to the Court by this listing. Suffice it to say the parties did not agree on who is unionisable and who is a management employee.

5. In his submissions, Mr. Ndolo submitted that the parties are restricted; they cannot cross the boundaries drawn by the Tripartite Partners- Labour, Employers and The Government. They are bound by the Industrial Relations Charter. The Charter excludes Executive Chairman; Managing Director; Deputy Director; Departmental Heads; Branch Managers; Persons in Charge of Operations and their Deputies; Persons with the power to Transfer, Hire, Appraise, Suspend, Promote, Reward, Discipline, and Handle Grievances; Persons under Training for the above positions; Personal Secretaries to the foregoing persons; Persons whose functional responsibilities are of confidential nature as shall be agreed upon between the parties; and any other category of staff who may in the case of any particular undertaking be excluded from trade union representation by mutual agreement.

6. The claimant submitted that management intends to extend the cadre of employees who may be regarded as management staff. The parties went before a conciliator appointed by the Minister for Labour. They could not agree on the levels of trade union representation. According to Mr. Ndolo a Security Officer cannot be a Manager. The Chief Conservation Manager is simply a Conservation Manager. The Chief Administration Manager should be the Human Resource Manager. There are no Research Programme Managers. There can be no two CEOs. The respondent cannot force levels of trade union representation on the claimant. Donor Relations Manager is just a Clerk recording what is donated. He is unionisable and should remain so. Siera 1, 2 and 3 are simply Security Officers who have no role in management. They should remain so. There is one Financial Controller. There are clerks under him. It is not possible to have another Financial Administration Manager. Mr. Ndolo stated his trade union does not want to have people being nicknamed. Employees who are unionisable should remain so. If there is any change in status, it should be the subject of consultations between the trade union and the employer. The claimant submitted that the position adopted by the respondent violated the Industrial Relations Charter. The respondent was bent on creating another class of employees who are not unionisable. All employees who cannot hire and fire should not be called managerial staff. The respondent has drifted in the direction of creating a third category of employees which is not in any level. Employees who do not attend the directors meetings should not be nick-named management. Employees should not be restricted. District Officers in Public Service are unionisable. A mere clerk is intended to be made a Manager. Mr. Ndolo revealed he has been in this Industry for 56 years and has never witnessed such an abomination. Trackers have never been Operations Managers. Though the claimant did not make any specific prayers, Mr. Ndolo submitted that the Court can be persuaded to give appropriate orders through the oration of a party made at the hearing.

7. Mr. Ambenge answered that the decision as to who is a manager is determined by the employer, not the trade union. The categories adopted by the respondent were established after a job evaluation. The positions are created depending on company policy. A department such as security has about 150 members of staff. Sieras are Deputies. The total workforce is 307. 241 are trade union members. The decision as to who is unionisable was guided by clause 2 of the CBA, which is founded on the tripartite Industrial Relations Charter. Appendix 'C' showed who should not be unionized. The organizational chart attached to the statement of reply clearly demonstrated who should not be unionisable. The staff duties are shown. These are not just nicknames, but substantive title holders with real decisional powers as laid out in the Industrial Relations Charter. It is a matter of company policy. The Conservancy covers over 60,000 acres. It deals with several issues. It needs competent managers. The claimant did not indicate what it is praying for in the claim. There is no clear prayer. The respondent has followed the Law in dealing with the levels of trade union representation.

8. Employees who are not unionized perform management functions; they supervise, appraise and enforce discipline. The employees the claimant has raised issues about are sectional heads and supervise staff. They perform accountable functions. Their role is incompatible with trade union representation. Their membership of the trade union would be in conflict with the management function. They formulate and implement the responsibilities of the employer. Mr. Ambenge asked the Court to find persuasion in the argument of Justice Paul Kosgei in ***Industrial Court Cause Number 35 of 2011 between Aviation and Allied Workers Union vs. Kenya Civil Aviation Authority*** where it was held that limitation on trade

union representation is important in safeguarding the managerial prerogatives. The existing levels of representation comply with the Industrial Relations Charter and the parties CBA. Out of 307 employees, 241 are union members. The claimant did not show that it is the right trade union to represent such management staff. It did not adduce evidence to show such management staff desired to be represented by the claimant. Lastly, Mr. Ambenge told the Court he did not understand the form of assistance the claimant seeks from the Court. There were no specific prayers in the claim. He asked the Court to dismiss the claim with costs to the respondent.

The Court Finds and Awards-:

9. The parties have a recognition agreement and have concluded several CBAs. Clause 2 of the CBA states that the '*terms and conditions set in this agreement shall cover all unionisable employees as per the Industrial Relations Charter which defines unionisable employees.'* The employees who are not eligible to be represented by the trade union are as given in paragraph 5 above. Mr. Ndolo did not exactly direct the mind of the Court in what specific way the respondent has violated this reasonable restriction on the exercise of freedom of association. The Industrial Relations Charter 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 stakeholders in mediating 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. These observations however do not mean that the Charter has always been helpful in resolving labour disputes. As can be seen in this dispute parties can give the limits on trade union representation under Appendix 'C' of the Charter, the interpretation that suits them.

10. The claimant seemed to be saying that the respondent is pushing job categories which are unionisable into management, without any substantive change in the status of the job holders. The nicknaming is meant to deny unionisable employees representation and weaken the trade union power. If the Court understood Mr. Ndolo properly, the respondent has gone the route of renaming unionisable employees as Managers. This employee has been fooled into believing he is now in management. There is no tangible benefit attached to the change in name. The claimant argued very emotionally, but did not provide any hard evidence on the nicknaming. It was not shown that the change is not real. Mr. Ndolo was availed the company organogram by Mr. Ambenge. The organizational structure was revealed. The claimant did not contradict the authenticity of the structure. There were job descriptions for every employee, complete with responsibilities and primary objectives. The grading structure was revealed. The claimant did not focus on this evidence given by the respondent.

11. It is possible for an employer to blur the intention of the Charter by giving inconsequential nicknames. There are repercussions to any change in the job title. One would expect there is an effect on the organogram; the organizational structure; job descriptions; responsibilities; primary objectives; grading structure; and fundamentally in the rate of the monthly remuneration. These are not issues that the claimant canvassed. The Court was not given a case of one employee who has been nicknamed while not enjoying any change in job grade or salary. Employers have the managerial prerogative to categorize their employees. They cannot conceivably however have a free hand in turning all employees into managers. They are limited by the hierarchical nature of the employment place. There will always be subordinate, mid level management and management staff. Not all can be entirely in management or in the trade union. Although the Constitution guarantees the right 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 in a democratic society. The claimant did not point to any activity by the respondent that would result in an unfair restriction on staff unionization. No employee was brought forward to testify that although given the title of Manager, he remained in the Lower echelons of the organogram, with an inferior job grade and remuneration. The submissions by the claimant were entirely in the realm of conjecture. Why should a company not have two CEOs? What does this management prerogative have to do with the trade union? Mr. Ndolo appeared to hold the view that

the trade union has a co-management function. Our laws do not allow trade unions to sit in the boards of companies. There is no co-determination and the Court would be rewriting the Industrial Relations Charter by finding that the claimant can restrict the respondent in having two or three Managing Directors at the apex of the organogram. It would have been a different scenario if the claimant had presented facts and evidence to show that two of the nicknamed managers are subjected to the terms and conditions of service comparable to those extended to the claimant's 241 members. What is the validity within the Constitutional, Legal and Industrial Relations framework of this country, of the claimant's assertion, that '*a security officer cannot be a manager; that there can be no two CEOs; and that because the company has a Financial Controller, it cannot have a Financial Administration Manager'?*

12. This Court agrees entirely with the good Judge brother Paul Kosgei in the interpretation he gave to Article 41 of the Constitution of Kenya and the Limitation under Article 24. Labour Rights are granted to both employers and the employees. The right to organize; the freedom of association; and the right to fair labour practices all shine down in equal measure upon the faces of employees and employers. The Constitution of Kenya has not opened the door of Industrial Relations to accommodate such esoteric principles as co-determination. The day has not arrived, when trade unionists sit in the boards of Kenyan companies with whom the trade unions have recognition agreements. The participation of trade unions in management of companies cannot extend beyond that which is agreed to between the parties under their recognition agreement and successive CBAs. The managerial prerogative is a fundamental principle in capitalist production. It must be protected and not consumed in the liberal slide into egalitarian anarchy. The Article on reasonable limitations in a Constitutional Democracy is aimed at ensuring there is a healthy balance between the ever increasing needs of social justice and the survival of the wielders of capital. Fair globalization, does not intend that we kill our production systems through a cavalier interpretation of the Constitution. The job grades and descriptions given by the respondent portray real managers, not glorified subordinates. Mr. Ndolo not only failed to say what the claimant's grievance is; he completely failed to give the Court material to grant an Award by deduction. ***The effect of this is that this claim is dismissed with no order as to costs***.

Dated and delivered at Nairobi this 22nd day of August 2012

James Rika

Judge