



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 2613 OF 2016**

**KENYA SHIPPING CLEARING**

**AND WAREHOUSING WORKERS UNION.....CLAIMANT**

**VERSUS**

**RAPID KATE SERVICES LIMITED.....RESPONDENT**

**RULING**

1. This ruling is triggered by the Claimant's application brought by Notice of Motion, under certificate of urgency, dated 21<sup>st</sup> December 2016 and filed in Court on even date.
2. The application, which is supported by the affidavit of the Claimant's General Secretary, James Onkoba Tongi seeks the following orders:
  - a) An order directing the Respondent to continue deducting and remitting union dues pending the hearing and determination of Cause No 1377 of 2016;
  - b) An order directing the Respondent to remit union dues for October, November and December 2016;
  - c) An order directing the Respondent to effect check off forms forwarded on 26<sup>th</sup> May 2016.
3. The following are set out as grounds for the application:
  - a) The Claimant and the Respondent had a cordial relationship up to the year 2012 when the Respondent stopped remitting union dues, citing the reason that the employees had left the union;
  - b) The Respondent deducted union dues in the year 2016, until the month of September 2016, when it stopped remittances to the union;
  - c) The Claimant's inquiries as to why the Respondent had stopped remitting union dues did not elicit any response;
  - d) On 26<sup>th</sup> May 2016, the Claimant forwarded two check off forms containing the names of thirty two (32) employees, together with Order No. 6324 of 2006, but the Respondent failed to deduct and remit union dues.

4. The Respondent's response is contained in a replying affidavit sworn by its General Manager, Henry Omolo on 8<sup>th</sup> February 2017. He depones that sometime in the year 2016, a dispute arose between the Claimant and another union, Transport Allied Workers Union (TAWU) as to which union ought to receive union dues and to negotiate a Collective Bargaining Agreement (CBA) with the Respondent.

5. Following this dispute, TAWU filed ELRC Cause No 813 of 2016 in which the Respondent and the Claimant were named as 1<sup>st</sup> and 2<sup>nd</sup> Respondents respectively. The matter proceeded in court and judgment was delivered on 23<sup>rd</sup> September 2016.

6. Omolo states that in Cause No 813 of 2016, the Court found that TAWU had a majority of the Respondent's employees as its members and ordered that a CBA be concluded. The CBA had since been registered.

7. It is further deponed that prior to the judgment in Cause No 813 of 2016, the Respondent was deducting and remitting union dues to both the Claimant and TAWU. However, after delivery of the said judgment and registration of the CBA, additional employees notified the Respondent of their resignation from the Claimant in favour of TAWU. The Respondent therefore stopped making deductions on behalf of the Claimant.

8. Omolo admits that there are still a few employees who are registered as members of the Claimant but is quick to add that under Section 54(1) of the Labour Relations Act, only a trade union representing a simple majority of employees is entitled to recognition for purposes of collective bargaining.

9. Omolo points out that the Claimant has filed yet another case being Cause No 1377 of 2016 which was struck out by **Wasilwa J** on the ground that the matters raised were *res judicata*.

10. In the submissions filed on behalf of the Respondent on 14<sup>th</sup> March 2017, it is submitted that the issues raised in this application are *res judicata* in light of the judgment of this Court in Cause No 813 of 2016.

11. In restating the principle of *res judicata* in ***Kenya Commercial Bank Limited v Muiiri Coffee Estate Limited & another [2016]*** the Supreme Court stated the following:

***“Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights.***

***The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process.”***

12. I have examined the Claimant's application in light of the plea of *res judicata* made by the Respondent. There is however a curious admission made by the Respondent's General Manager, Henry Omolo in his affidavit sworn on 8<sup>th</sup> February 2017. At paragraph 12 of the said affidavit Omolo depones as follows:

***“THAT although there are still a few employees registered with the Claimant, Section 54(1) of the Labour Relations Act provides that an employer shall recognize a trade union for purposes of collective bargaining if that trade union represents the simple majority of the unionisable employees.”***

13. I have revisited my judgment in Cause No 813 of 2016 and find nothing allowing the Respondent to stop deducting and remitting union dues on account of the Claimant's members, even if they are in the minority. There is a difference between representation of workers by a trade union of their choice and

recognition which allows a trade union to negotiate a CBA.

14. In this regard, the right of every worker to participate in the activities of a trade union of their choice, which is guaranteed under Article 41 of the Constitution of Kenya, 2010 cannot be taken away by the mere fact that a rival union has many members. In ***Kenya National Private Security Workers Union v Lavington Security Limited (Cause No 377 of 2013)*** this Court held that:

***“The notion that the absence of recognition vitiates the employee’s right of representation has no place in our time as it flies right in the face of the express provisions of the Constitution.”***

15. It would appear therefore that the Respondent misread the judgment of this Court in Cause No 813 of 2016 and overreached itself by stopping deduction and remittance of union dues on account of the Claimant’s members.

16. Consequently, I direct the Respondent to commence deduction and remittance of union dues on account of all the Claimant’s members forthwith.

17. Each party will bear its own costs.

18. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 22<sup>ND</sup> DAY OF SEPTEMBER 2017**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Tongi (Union Representative) for the Claimant

Miss Githii for the Respondent