



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 110 OF 2014

TITUS WAMALWA KHAEMBA CLAIMANT

VERSUS

TRANSPORT WORKERS UNION (KENYA) RESPONDENT

RULING

1. The ruling relate to two applications one dated 31st January 2014 filed by the claimant and another dated 7th February 2014 filed by the respondent. Both will be considered together as they relate to the same issues and emanate from the same transaction, the non-payment of the claimant's salary and the non-remittance of union dues.
2. On 31st January 2014 the claimant Titus Wamalwa Khaemba filed a Notice of Motion under the provisions of Rule 16(1) and (2) of the Industrial Court Procedure Rules, section 12 of the Industrial Court Act and section 18(2) of the Employment Act seeking for orders that the respondent be directed to remit his unpaid salaries and further that future salaries be guaranteed. This application is supported by the annexed affidavit of the claimant. In response, the respondent filed the Replying Affidavit sworn by Simon Kigalu on 7th February 2014.
3. The respondent filed the application dated 7th February 2014 under section 3 and 4 of the Industrial Court Act seeking for orders for orders of stay against orders issued on 31st January 2014 directing the release of claimant due salaries. The application is supported by the annexed affidavit of Simon Kigalu. The claimant replied to this application through the Replying Affidavit sworn on 14th February 2014.
4. The claimant's application is based on the grounds that the respondent has not remitted his monthly salaries, allowances, National Security Fund (NSSF) deductions, National Hospital Insurance Fund (NHIF) deductions and other statutory deductions. That the salary due for September to December 2013 and that of January 2014 amounting to kshs.400,000.00 has not been paid and further that the car allowance or commuter allowance of Kshs.10,000.00 for May to December 2013 and January 2014 has not been remitted and now amounts to kshs.90,000.00. that there is no reason why the due salary or the statutory deductions have not been paid and this has affected the claimant, his family especially his daughter who is in school and the fees has not been paid and that he is about to be evicted from his rented premises. That these are unlawful actions by the respondent that should be stopped as they are in breach of the law and the claimant's constitutional rights.
5. In support of the application, the claimant in his affidavit states that he is the Deputy Secretary General of the respondent and his salary was reviewed on 1st January 2012 which is deposited with Equity Bank Account No.[particulars withheld], Tom Mboya Branch. In June 2013 the respondent gave

the claimant bouncing cheque with regard to salary due and allowances which have now accumulated unpaid for September to December 2013 and January 2014 all amounting to kshs.400, 000.00. The non-remittance of the salary due has affected the statutory deduction to NSSF and NHIF which has affected the claimant in provision to his family and may be penalised for non-remittance of statutory dues. This non-payment of salary is illegal and the court should direct the respondent to pay these dues.

6. The respondent in reply state that the claimant's application has no merit and should be dismissed and the court should vacate orders made on 31st January 2014 as these orders were made without disclosing to the court that the claimant has opened a fraudulent bank account in the name of the respondent in the name of Transport Workers union Kenya Airport Brank, being account No.[particulars withheld] at NIC bank Kenyatta Avenue. That this account was opened by the claimant when he had knowledge that the respondent had a gazetted Union Account at Barclays Bank Queensway Account No. [particulars withheld] where all union dues are banked. That the respondent does not owe the claimant Kshs.400, 000.00 in salary arrears, as these were paid as follows;

On 23rd October 2013 salary due for September 2013 was paid; and

On 22nd November 2013 salary due for October 2013 was paid.

7. That when the respondent realised that the claimant had opened an illegal bank account with NIC bank they held a meeting on 16th December 2013 and resolved to file a case against the claimant and one Dishon Ogowa on 17th December 2013 being industrial Cause No.2011 of 2013 seeking orders of the court to compel the two to return dues banked in the illegal account. The respondent also resolved to withhold the claimant's salary until he is able to account for the cheques he illegally banked into an illegal account. In December 2013, the respondent decided to pay the claimant his salary through cheque No.[particulars withheld] on humanitarian grounds but the claimant refused to take it. That when the claimant was served summoned in Industrial Cause No.2011 of 2013 he rushed to court to file this application. That it is not the first time the claimant has opened an illegal account in the name of the respondent and diverted cheques to such accounts and withdrawn the same for his own benefit. In 2008 and 2009 the claimant opened an illegal account and diverted the respondent cheques and was cited for contempt and punished by the court in Industrial Cause No.190 (N) of 2008 on 18th January 2010.

8. The respondent further state that if the orders of this court issued on 31st January 2014 are implemented, they will prejudice the respondent as the claimant will have been paid twice. That the claimant collected the following cheques and illegally utilised them;

Cheque from Rapid Kate dated 2nd December 2013 for kshs.91, 502.95 cheques No.[particulars withheld]

Cheque from Express Kenya for kshs.15, 750.00 that was banked on 18th December 2013;

Cheque from Pullmans Tours and Safaris limited for Kshs.54, 000.00 cheques No.[particulars withheld] and dated 27th November 2013.

9. That these illegal activities have been reported to the police, Embakasi Police Station and Bamburi Police Station. That the claim herein has been filed to hide his guilt following other matters before this Court in Cause No.110 of 2004 and Cause No.2011 of 2013. The claimant forged annexures to his application purporting a letter from Kenya Revenue Authority to be directed to the General Secretary whereas the true letter was sent to the respondent. The claimant is not entitled to transport or commuter allowances as these are only due when he undertakes office duties. That in the circumstances of this case, the orders dated 31st January 2014 should be vacated as they will prejudice the respondent.

10. The second application by the respondents is based on the grounds that the claimant obtained order from this Court on 31st January 2014 and if implemented will seriously prejudice the respondent as it will result in double payment to the claimant. the claimant while obtaining these orders failed to disclose that

he had illegally opened a fraudulent bank account in the name of the respondent where he has diverted funds of the respondent into NIC Bank Account No.[particulars withheld] under the Name, Transport Workers Union Kenya Airport branch which was contrary to the law as the respondent has their gazetted account at Barclays Bank Queensway Account No.[particulars withheld] where all dues must be banked.

11. Further grounds are that the claimant failed to disclose to the court on 31st January 2014 that he had diverted funds to an illegal account and that there is Cause No.2011 of 2013 that address this matter and is pending in court. The claimant has illegally received kshs.91, 502.95 and when the respondent asked him to deposit these amounts in the gazetted account he refused forcing the respondent to convene a meeting and direct that his salaries not be paid. The respondent does not owe the claimant Kshs.400, 000.00 as claimed and the orders of 31st January 2014 should be vacated.

12. In the supporting affidavit, Simon Kigalu states that he is the General Secretary of the respondent and conversant with the matters before court. That the orders of the court issued on 31st January 2014 should be vacated as they were obtained without full disclosure of facts noting that the claimant has opened a fraudulent account where he has diverted union funds. The claimant collected various cheques for the respondent and instead of banking these with the gazetted account, he opened a new account and diverted the same illegally the respondent has reported these matters to Embakasi and Bamburi Police Stations. That to pay the claimant as claimed would be a double payment as he has diverted the respondent funds for his own used and thus would be a miscarriage of justice were the respondent to pay as directed on 31st January 2014.

14. in reply the claimant stated that the salaries claimed are due and owing and paying these dues will not prejudice the respondent. The claimant denies the allegation that he fraudulently opened an illegal account in the name of the respondent. That the cheque from Express Kenya Limited was from the airport branch account and was thereafter transferred to the respondent bank account, there is no proof that the claimant collected a cheque from Pollmans Safaris and that the matter has been reported to the police as the claimant has never been charged. Industrial Cause No.2011 of 2013 has not been heard and determined and thus irrelevant in this case and if the respondent convened any meeting to decide on the claimant salary the same was illegal and its decisions invalid. No salary was paid on 16th December 2013 and there is no evidence that cheque No.[particulars withheld] was forwarded to the claimant on humanitarian grounds. Salaries are made through bank deposit and not through cheques and the respondent should explain the change in practice with regard to the claimant's salary.

15. The claimant further stated that the application as filed is defective as the respondent has filed the same without the authority of the National Executive Committee which has the sole right to decide whether or not to institute legal proceedings. The respondent's application should therefore be dismissed and the court to direct the respondent to pay the salaries due.

There are several questions that need to be addressed in this ruling being;

What is the Standing of the parties herein?

Whether there are salaries due to the claimant

Whether there should be Stay of payment of salaries due to an employee.

16. The claimant has raised the question of standing and that the respondent General Secretary Simon Kigulu lack the authority to swear the supporting affidavit herein as he had no authority from the National Executive Committee. Section 22 of the industrial Court Act is imperative and states;

In any proceedings before the Court or a subordinate industrial court, a party to the proceedings may act in person or be represented by an advocate, an office bearer or official of the party's trade union or employers' organisation and, if the party is a juristic person, by a director or an employee specially authorized for that purpose.

17. At paragraph 2 and 3 of Simon Kigulu's Replying Affidavit and the Affidavit in support of the respondent application, he states that he is the General Secretary of the Respondent a fact that is not disputed by the claimant. The only dispute is that as the General Secretary of the respondent, he needs the authority of the national Executive Committee to commence proceedings as herein.

18. Noting the provisions outlined above as under section 22 of the Industrial Court Act and further the provisions under section 39(c) of the Labour Relations Act, these read together give authority on a union official to commence and defend proceedings against a trade union where they are such an official. The claim herein commenced by the claimant was against the respondent trade union, his employer and the defence has been filed by the respondent with supporting affidavits sworn by the Secretary General as an official of the respondent union. Where there is no dispute that the said Simon Kigulu is not an official of the respondent, then in law and with regard to the provisions of section 22, the person serving as General Secretary of a trade union is an official with capacity to represent such a trade union like the respondent in court proceedings like these one. By the claimant's own documents annexed as TWK1 is an extract from the Registrar of Trade Unions that indicate the current officials of the respondent noting that the claimant is the 2nd Assistant Secretary General while Simon Kigulu is the Secretary General. I take notice that this is the valid record of the current status of the respondent as submitted by the claimant. This is a confirmation that indeed the respondent by being represented by the Secretary General, they are in compliance with section 22 of the Industrial Court Act.

19. As submitted by the claimant, the Employment Act now creates duties and responsibilities for employees and employers as well as rights and duties. Section 18 now provides that a salary or wage is due where an employee has served for the time agreed upon between the employee and employer. It is not disputed that the claimant was a salaried employee of the respondent paid through a bank transferred in arrears for each month served. Thus the salary dues after every month becomes due at the end of each served month which in law become payable as labour has been offered for a consideration paid in a salary. The non-payment of this salary has other legal implications not just to the employee but to other statutory bodies that ought to give services as by law established once there is confirmation that the salary was paid less deductions due to these statutory bodies. In this regard, the claimant stated that when the respondent failed to pay his salaries as due, there was no remittance of the statutory dues to NSSF and to NHIF. This is a serious omission by an employer and the non-payment of these statutory dues by the respondent will negatively impact on the claimant and or be forced to pay the penalties due for the non-remittance of these statutory dues.

20. That said it is clear that there are deeper problems as between eh claimant and his employer or within the respondent union as from eh records, there are several other matters pending before this court part of this being **Cause No.2011 of 2013 between the respondent officials as against the claimant and another**. This cause was filed on 17th December 2013 seeking for orders that;

Pending the hearing and determination of this application inter-parties, this honourable court be pleased to issue and order compelling the 1st respondent (Titus W. Khaemba) to remit in to the Gazetted Union Bank at Barclays Bank Queensway Account No.[particulars withheld] (the 1st Applicant/claimant gazetted Bank Account), the sums of kshs.54,000.00 which monies are property of the union and the 1st respondent unlawfully and illegally picked in cash directly from the employer known as Pollmans Tours and Safaris in the month of July 2013 and converted to his own use or withheld instead of depositing into the union Gazetted Bank Account as provided under the Labour Relations Act and also as per an existing Court order issued by the Industrial Court on 15/10/2009.

21. The respondent however fails to state to this Court as to the current status of this matter [Cause No.2011 of 2013] especially as regard to the above outlined prayers. There is equally no effort by either party to have these two suits consolidated for expeditious disposal of the issues which seem to overlap and or involve both parties. On the one hand the respondent states that the claimant failed to disclose material facts that he had received cheques for payments to the respondent from various employers one of them being Pollmans Tours and Safaris Limited as outlined in Cause No.2011 of 2013 and the claimant on the other hand states that the respondent is only sharing these details so as to continue unjustly denying

him his due salaries. Hence both parties have an interest in matters outlined as under Cause No.2011 of 2013 by the reasons differ as to the nature of the interests.

22. This court is guided by the law, where a salary is due, the same must be paid. In submissions, the respondent stated that salaries for September were paid on 23rd October 2013; while the salary due for October was paid on 22nd November 2013. This is confirmed by the claimant's own bank statements attached to his supporting affidavit. That there is now a cheque that was issued on 16th December for salary due for December 2013. The claimant is seeking to have his salaries for September to December 2013 and January 2014 paid. I take it then from the respondent that apart from January 2014 all the due salaries have been paid.

23. The alleged fraudulent illegal account is said to have been opened by the claimant is the account held by NIC Bank being Account No. [particulars withheld] under the Name, Transport Workers Union Kenya Airport branch. The respondent is the **Transport Workers Union Kenya** whereas the entity under which the claimant is alleged to have fraudulently dealt is under **Transport Workers Union Kenya Airport branch**. The court reading of the two indicates two separate entities and where registered or with a legal standing have capacity to act under their right name and to transact like any other person in law. However, the cheques stated to have been illegally dealt with by the claimant are;

Cheques No.[particulars withheld] issued by Pollmans Tours and Safaris Ltd for kshs.54, 000.00 and dated 27th November 2013;

Cheque No. [particulars withheld] issued by Rapid Kate Services Ltd for akshs.91, 000.00 and dated 2nd December 2013; and

Cheque from Express Kenya for kshs.15, 750.00 that was banked on 18th December 2013.

24. A look at these records indicate that the cheques were all issued to **Transport Workers union Kenya** in which case therefore, the respondent was the beneficiary and not the other entity **Transport Workers Union Kenya Airport branch**. On 18th December 2013, **Transport Workers Union Kenya Airport branch** drew two cheques No.[particulars withheld] and [particulars withheld] for Kshs.91, 502.95 and 15,750.00 respectively both payable to the Transport Workers Union. I agree with the respondent submissions that there is need for further investigations as to the transactions regarding these cheques, the issuance, deposits and transfer to the *transport Workers Union*. Fraud, forgery and misappropriation of funds are serious criminal acts that ought to be dealt with firmly and before the right court. I dully recognise there is now a report with Embakasi and Bamburi Police Stations in this regard. This should be pursued to bear fruits.

25. With that said, I note the respondent has a union Constitution which under Rule 26 deal with *discipline*. Without going n into the merits of the main cause and matters that may have been addressed as under Cause No.2011 of 2013, I note that the Rules outlined in part 26 of the respondent Constitution create a forum as to how to deal with a member who acts to the detriment of the respondent. None of these provisions include a sanction that a salary can be withheld for any reason. Even in a case where such a provision was to be made, the same is subject to applicable law as under section 18 of the Employment Act.

The short significance of this is that the stay granted to the respondent and dated 11th February 2013 is lifted, the application dated 31st January 2014 is hereby granted to the extent that the claimant be paid his dues salaries not remitted to date and the respondent to remit to the NSSF and NHIF all pending dues. As outlined above, I direct that there be a consolidation of Industrial Cause No. 2011 of 2013 for hearing and disposal of the same.

Dated and delivered in open court this **4th** Day of **March 2014**.

M. Mbaru

Judge

In the presence of:

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