



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT MOMBASA**

**CAUSE NO. 253 OF 2014**

**HASSAN ALI ATIENO OWINO .....CLAIMANT**

**VERSUS**

**1. JAMES ONKOBA TONGI**

**2. UNION LOGISTICS LIMITED .....RESPONDENT**

**J U D G M E N T**

**INTRODUCTION**

1. The claimant brought this suit against the respondents claiming ksh.200,000 plus interest being his judgment debt collected by the 1<sup>st</sup> respondent from the second respondent in 2004 but which money was never surrendered to the claimant. The claimant is also seeking a declaration that the 1<sup>st</sup> respondent is unfit to contest or hold an office in Kenya shipping Clearing and Warehouses workers Union (the union).
2. The basis for this suit is that the claimant was employed by the 2<sup>nd</sup> respondent but was dismissed after sustaining injury while on duty. He reported the matter to the union and the union appointed 1<sup>st</sup> respondent to represent the claimant in a case for compensation for the said Industrial accident. A consent judgment for ksh.200,000 was entered on 26/11/2004 in Cause No. 3 of 2004 in favour of the claimant. The money was paid through a Cheque drawn in favour of the 1<sup>st</sup> respondent personally.
3. The respondents did not file any defence to the claim but the 1<sup>st</sup> respondent filed a replying affidavit to the Notice of Motion dated 4/6/2014 which had been filed contemporaneously with the claim. In the said replying affidavit the 1<sup>st</sup> respondent raised Preliminary Objection to the Motion on grounds that the suit is time barred because the cause of action arose in 2004 and that the same declaration orders are also being sought in Cause No. 844 of 2011 filed by some union members against him and which suit pending before Industrial Court at Nairobi. In addition he objects to the suit because it ought to have been filed in Nairobi where the cause of action arose. Lastly the 1<sup>st</sup> respondent has averred that the claimant was never a member of a union and as such he should not involve himself in the affairs of the union.
4. In response to the objection raised, the claimant averred that the Head Office of the Union based here in Mombasa where the 1<sup>st</sup> respondent works as the full time Executive officer. He further averred that the cause No. 844 of 2011 involved different facts from the present suit and has already been withdrawn.
5. The suit was heard on 23/9/2014 when the claimant testified as CW1 and the 1<sup>st</sup> respondent as

RW1. The 2<sup>nd</sup> respondent however, did not participate in the suit at any level.

### **CLAIMANTS CASE**

6. CW1 was employed by the 2<sup>nd</sup> respondent and in the year 2000, he got an accident as a consequence of which he was dismissed. He reported the matter to the union as a member and the union lodged a claim for over 500000. The matter went on in his absence and got no update. In 2009 CW1 decided to go and peruse the court file and discovered that judgment in his favour had long been entered for ksh.200,000. He then took copies of the proceedings from the court file (doc.9) and wrote to the union's General Secretary (GS) Mr. Robert Abwoga about the matter (doc.14). The GS promised to investigate the matter and update the CW1.
7. In the meantime CW1 obtained from 2<sup>nd</sup> respondent a copy of cheque No, 004401 for ksh.200,000 dated 16/11/2004 which was drawn in favour of the RW1 (doc.12). According to CW1 the said cheque should have been in his name or the union and not RW1 personally. When CW1 showed the GS copy of the cheque, the GS stated that the cheque was never paid to the union and as such CW1 should recover his money from RW1.
8. RW1 became evasive but on 23/11/2009 he paid ksh.5000 to CW1 and promised to clear the balance by the end of 2009. Meanwhile on 30/11/2009, the union gave CW1 a cheque for ksh.40000 plus ksh.3000 cash but with instructions not to bank the cheque until after 2 months. In February 2010, the union paid a further ksh.12000 and told the CW1 that he should not expect more pay from the union.
9. CW1 consequently reported the matter to the police and RW1 was arrested after which he paid CW1 ksh.10000 and executed an agreement to pay the balance by installment of ksh.20000 per month. Thereafter the union paid the CW1 Ksh.12000 on 25/3/2010, ksh.24000 on 18/7/2010, ksh.12000 on 1-4-2011, Ksh.25000 on 15/7/2011, ksh.10,000 on 7/3/212, ksh.10000 on 17/5/2012 and ksh.5000 on 21/6/2012. He however contended that the cheque for ksh.25000 dated 15/7/2011 was dishonoured and as such the total pay received by CW1 was only Ksh.132,200 leaving a balance of ksh.67800. He prayed for the said ksh.67800 plus interest and costs of the suit.
10. On cross-examination by the defence counsel, CW1 admitted that it was the union who represented him in the case No. 3 of 2004 against CW1's employer. CW1 clarified that it was the 1<sup>st</sup> respondent who represented the union in the said suit in which CW1 was awarded ksh.200,000. He denied that he used the police to collect the debt from 1<sup>st</sup> respondent but explained that he took the action after the union's GS told him that the union could not pay him any more money. CW1 maintained that cheque No. 000987 dated 15/7/2011 for Ksh.25000 bounced and was never replaced.
11. He admitted that the only sum he should have sued for is Ksh.67800 and not ksh.200000. He further admitted that Ksh.3000 might have been deposited in his account on 6/5/2011 but he was not certain because he had not been shown the banking slip before.

### **DEFENCE CASE**

12. RW1 admitted that he worked for the union at Nairobi. He admitted that in 2004 he represented union in case No. 3 of 2004 where CW1 was awarded ksh.200,000. According to RW1, all the said money had been paid to the CW1 as at 4/6/2014 when he brought this suit. According to RW1 the payment to CW1 was as per the tabulation dated 17/7/2014 and filed in court on the same date. He dismissed the testimony by CW1 as falsehood and prayed for the suit to be dismissed with costs.
13. On cross-examination by the CW1, RW1 admitted that all the CW1's decretal sum of ksh.200,000 was paid to him (RW1) by cheque in 2004 but he did not pay him until 2009. According to RW1, CW1 had told him that he was going to Sudan and as such after consulting with the GS, RW1 asked that the cheque for the decretal sum be written in his name. As regards tabulation of payments, RW1 could not prove that ksh.25000 cash shown in item 15 was banked in CW1's account. RW1 maintained that CW1 was paid his money longtime ago and as such he was not entitled to any interest.

14. After the close of the hearing the parties were directed to file written submissions. The claimant filed but the defence did not. The court has carefully considered the pleadings, evidence and submissions in coming up with this judgment.

### **ANALYSIS AND DETERMINATION**

15. There is no dispute that RW1 received Ksh.200,000 on behalf of CW1 from the 2<sup>nd</sup> respondent in November 2004. It is also undisputed fact that RW1 never gave the said money to the CW1 until 2009 when CW1 discovered the judgment after pursuing the court file number 3 of 2004. It is also not in dispute that since 2009, CW1 has been paid some money by the union and the RW1 towards settlement of the said debt of Ksh.200000. The court does not think that the suit is time barred because the same was revived by the RW1's undertaking to pay the same vide Agreement dated 12/3/2010 and has indeed been paying until 2012. Likewise the court does think that it should involve itself in investigating whether or not RW1 is suitable to seek elective or other office in the union. The court would rather leave that to the union members and other government agencies.
16. The issue for determination is whether CW1 has been paid all his debt of Ksh.200,000 and if not how much is still owing.

### **Any debt still owing**

17. According to the CW1, he has paid ksh.5000 on 29/9/2009, ksh.3000 cash plus cheque for Ksh.40000 on 30/11/2009, ksh.12000 on 11/2/2010, ksh.10,000 on 12/3/2010, ksh.12000 on 25/3/2010, Ksh.24000 on 18/7/2010, Ksh.1200 on 1-4-2011, ksh.10000 on 7/3/2012, ksh.10000 on 17/5/2012 and ksh.5000 on 21/6/2012 which total to ksh.132200. CW1 explained that a further cheque for ksh.25000 issued 15/7/2011 was dishonoured and was never replaced. A simple calculation gives ksh.67,800 as the balance due and still owing to the claimant from the 1<sup>st</sup> respondent. However no debt has been proved against the 2<sup>nd</sup> respondent and as such the claim against her is dismissed.

### **DISPOSITION**

18. For the reasons above judgment is entered for the claimant against the 1<sup>st</sup> respondent for ksh.67800 plus interest at court rate from November 2004 till payment in full. The 1<sup>st</sup> respondent will also pay to the claimant costs of the suit plus interest.

Orders accordingly.

**Dates, signed and delivered this 7<sup>th</sup> November 2014**

**O. N. Makau**

**Judge**