



Khaemba v Transport Workers Union Kenya & another (Employment and Labour Relations Cause 1188 of 2015) [2024] KEELRC 1099 (KLR) (9 May 2024) (Ruling)

Neutral citation: [2024] KEELRC 1099 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1188 OF 2015**

NJ ABUODHA, J

MAY 9, 2024

BETWEEN

TITUS WAMALWA KHAEMBA APPLICANT

AND

TRANSPORT WORKERS UNION KENYA 1ST RESPONDENT

DAN MIHADI (GENERAL SECRETARY) 2ND RESPONDENT

RULING

1. The Claimant/Applicant filed application dated 5th October, 2023 under Order 45 Rule 1 of *Civil Procedure Rules* and Rule 17 of the *ELRC (Procedure) Rules*, 2016 seeking for orders of the court to stay and set aside its Ruling delivered on 22nd September 2023 and all its consequential Orders, in respect of Notice of Motion dated 17th March 2023. The Applicant further sought for recusal of the judge herein from this matter and sought to refer the file to be placed before the Principal Judge for directions on the hearing and determination of the Applicant's Notice of Motion dated 17th March 2023.
2. The application was supported by the Affidavit of Titus Wamalwa Khaemba the Claimant herein.
3. The Applicant averred that he was first aggrieved by the decision of the Lady Justice Monica Mbaru delivered on 26th January, 2023 in which she allowed the Respondent's application dated 27th September, 2022 and ordered him to pay legal costs equivalent of Kshs 100,000/=.
4. The Applicant averred that through his Notice of motion dated 17th March 2023 he sought stay of the execution of the said ruling when this court on 22nd September, 2023 delivered a ruling to the extent that his application was dismissed with costs.
5. The Applicant averred that the said application was made without undue delay and after he buried his father who died around the time when the impugned ruling was delivered.



6. The Applicant averred that despite overwhelming evidence on record and elaborate submissions by himself, the learned judge proceeded to dismiss his application to the extent that he approached the court leisurely.
7. The Applicant further averred that the learned judge did not substantiate how he approached this court leisurely, in any case, and in that account alone, the judge demonstrated biasness while determining his application. That the finding by the Learned Judge that he was not willing to offer security was contrary to his pleadings and submissions as he indicated his willingness to provide bank guarantee.
8. The Applicant averred that while making the determination the Learned Judge moved with sense of biasness, fixed and pre-determined mind thereby causing miscarriage of justice against him.
9. The Applicant averred that the learned Judge has since determined the applicant's intended appeal, by insinuating that the applicant's appeal was filed outside prescribed timelines while aware that no such appeal has been filed.
10. The Applicant averred that the reasoning and comment by the judge that the notice to appeal was filed/lodged outside 14 days provided by the rules is not true as he lodged and paid for the notice of appeal on 8th February, 2023 which action was within time provided.
11. The Applicant averred that the concept and principle of judicial recusal is derived from the Constitution, statutory and common law principles. That under common law the concept is embodied in the principle that no person shall be a judge on a case in which they have interest and the Judge has manifested open bias in the matter.
12. The Applicant further averred that the concept of recusal was a step towards constitutional right of fair hearing. That he has a good case which should be heard and determined independently by a different judicial officer of this court.
13. The Applicant averred that the Respondent will not be prejudiced in any way in the event the application dated 17/3/2023 is heard a fresh as both of them will have an equal opportunity to participate in the proceedings. That he will be prejudiced if execution proceedings ensue.
14. The Applicant averred that it is in the interest of justice that the application is allowed since he has approached the court with no undue delay.
15. The Respondents filed their reply statement dated 23rd October, 2023 to the Claimant's Application and prayed that the Claimant Review Application dated 05/10/2023 is devoid, unmerited and be dismissed with further costs of the Application.
16. The Respondents averred that the Applicant's claim of biasness by the presiding Judge was misplaced and unsupported allegation. That litigation must come to an end since the matter has been in court for 8 years and the Applicant's application was a waste of court's time made to prevent the Respondents from enjoying fruits of their judgement.
17. The Respondents averred that such claim of biasness must be proved beyond reasonable doubts.
18. The Claimant filed a further affidavit sworn on 10th November, 2023 where he averred that the Respondent's reply merely opposed the Application through assumptions that the Review Application is not merited. The Applicant denied such allegations in the reply.
19. The Application was dispensed of by written submissions.



Determination

20. I have considered the Application as filed by the Claimant herein and proceed to analyse as follows. The court has powers to review its own orders under the law and rules of this Court.

21. Section 16 of the [Employment and Labour Relations Court Act](#), 2011 provides as follows;

The Court shall have power to review its judgements, awards, orders or decrees in accordance with the Rules.

22. Further Rule 33 of the [Employment and Labour Relations Court \(Procedure\) Rules](#), 2016 provides for review as follows:-

1. A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—
 - a) if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
 - (b) on account of some mistake or error apparent on the face of the record;

(c)	if the judgment or ruling requires clarification; or
(d)	for any other sufficient reason.
(a)	if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
(b)	on account of some mistake or error apparent on the face of the record;
(c)	if the judgment or ruling requires clarification; or
(d)	for any other sufficient reason.

24. The Applicant in this case has not sufficiently illustrated any of the grounds of the review as provided by the [ELRC Act and rules](#). The application is in the nature an appeal against the ruling of the Court.

25. On the prayer for recusal, in the case of [Rachuonyo and Rachuonyo Advocates v National Bank of Kenya Limited](#) [2021] eKLR Justice Majanja while faced with the same issue of recusal went on as follows,



In *Jan Bonde Nielson v Herman Philipus Steyn & 2 others* HC COMM No. 332 of 2010 [2014] eKLR the court observed that:

The appropriate test to be applied in determining an application for disqualification of a Judge from presiding over a suit was laid down by the Court of Appeal in *R v David Makali And Others C.a Criminal Application No Nai 4 And 5 Of 1995* (unreported), and reinforced in subsequent cases. See *R v Jackson Mwalulu & Others C.a. Civil Application No Nai 310 Of 2004* (Unreported) where the Court of Appeal stated that:

“...When courts are faced with such proceedings for disqualification of a judge, it is necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice. The test is objective and the facts constituting bias must be specifically alleged and established...”

26. The Applicant in this has not reasonably demonstrated what the Judge in this case did outside of factual and circumstantial analysis of events that a reasonable person would deem as amounting to bias. Further, the *Judicial Service (Code of Conduct and Ethics) Regulations* 2020 under regulation 21 provides that a Judge can recuse himself or herself in any of the proceedings in which his or her impartiality might reasonably be questioned where the Judge “has actual bias or prejudice concerning a party.”
27. In this case the Applicant has not illustrated how in the Ruling of 22nd September, 2023, the court was biased to him as a party. He is only dissatisfied with the same. I note this is an old matter and as the respondent rightly puts it, there should be an end to litigation. It is not right to ask a Judge to recuse himself simply because such Judge has arrived at a conclusion based on facts as represented and canvassed by the parties that does not, please one of them. Accusing a Judge of bias is a serious matter and ought to be supported by credible evidence of such bias. It must never be whimsically invoked to intimidate a Judge and give room for forum shopping for a more friendly judge, if such judges exist in our judicial hierarchy. In any case the Applicant had a right to appeal this Court’s ruling as of right if he was dissatisfied with the said ruling instead of dragging this Court in the manner he is doing into his dissatisfaction with the ruling.
28. The Application is therefore found without merit and is hereby dismissed with costs.
29. It is so ordered

DATED THIS 9TH DAY OF MAY, 2024 DELIVERED THIS 9TH DAY OF MAY, 2024

ABUODHA NELSON JORUM

JUDGE

