



**Musyoki v Kenya Airways Limited (Cause E644 of 2021)
[2024] KEELRC 1788 (KLR) (10 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1788 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E644 OF 2021**

**JK GAKERI, J
JULY 10, 2024**

BETWEEN

MORRIS MUINDI MUSYOKI CLAIMANT

AND

KENYA AIRWAYS LIMITED RESPONDENT

RULING

1. Before the court for determination is the Claimant’s Notice of Motion dated 10th March, 2024 filed under Certificate of Urgency seeking orders that;
 1. Spent.
 2. The Honourable Judge Dr. Jacob Gakeri to recuse himself from the main case E644 of 2021.
 3. The application dated 26th November, 2023 and ruling delivered on 28th February, 2024 be reviewed and the ruling given afresh, for the ruling given by the honourable judge is not fair.
2. The Notice of Motion is expressed under the Penal Code and is based on the grounds set out on its face.
3. The applicant states that the ruling delivered by the Honourable Judge on 28th February, 2024 did not consider the documents he alleged to have been forged as the Respondent’s response to the allegations consisted of empty statements as the document entitled “release and discharge” is not genuine.
4. It is the applicant’s case that the Respondent has not filed the copy of the identity card he used to secure employment by the Respondent and fails to understand why the judge held that he had not availed evidence.
5. That the Respondent’s response to the application dated 26th November, 2023 and the applicant’s submissions consisted of fabricated statements unsupported by evidence.
6. The Claimant calls upon the Judiciary for a fair review and ruling of the instant Notice of Motion.



Claimant's submissions

7. Strangely, the Applicant states that he is relying on the documents filed in support of the application dated 5th September, 2023.
8. The Claimant/Applicant submits that the Respondent could not have paid him terminal dues as it alleges that he had forged the Form Four certificate.
9. That the “release and discharge” on record is not genuine as it has no company logo, letter head or signature.
10. The Applicant further submits that he disagrees with the previous ruling of the court and felt that the judge was against him and would appreciate if awarded his salary at this stage.
11. That the Applicant is apprehensive that the judgment in the main suit will be compromised.

Respondent's submissions

12. Counsel for the Respondent submits that the Applicant has not availed any evidence of actual bias on the part of the Judge and cites the test in *Jan Bonde Nielsen V Herman Philipus Sleyne & 2 others* (2014) eKLR, *Philip K. Tunoi & another V Judicial Service Commission* (2016) eKLR and the Supreme Court decision in *Jasbir Rai & 3 others V Tarlochan Singh Rai & 4 others* (2013) eKLR to reinforce the submission.
13. Counsel urges that none of the grounds cited by the Applicant falls under Regulation 21 of the Judicial Service (Code of Conduct & Ethics) Regulations, 2020 and the Claimant has not shown any reasonable ground to assume the possibility of bias.
14. Counsel urges that a Judge has a duty to preside over a case and a recusal without a valid legal basis erodes trust in the legal system and cites the sentiments of *Majaja J. in Rachuonyo & Rachuonyo Advocates V National Bank of Kenya* (2021) eKLR where the learned judge refused to recuse himself.
15. Finally, counsel relies on the sentiments of the court in *Joyce N. Simitu V Stephen O Mallowah & 2 others* (2013) eKLR and *Community Uplift Ministries V Nathan Chesang Moson & others* (2019) eKLR to urge that the Applicant has failed to prove the likelihood of bias and as such the application ought to be dismissed.
16. The issues for determination are;
 - i. Whether there is an application for review before the court.
 - ii. Whether the Judge should recuse himself from hearing this suit.
17. Concerning the first issue, the Applicant seeks orders that;

“The application dated 26th November, 2023 and ruling done on 28th February, 2024, be reviewed and the ruling to be given a fresh, for the ruling given by the Honourable Judge is not fair.”
18. Regrettably, the Respondent did not address this issue in its submissions.
19. The applicant's case on the foregoing issue is grounded on the argument that the documentary evidence filed by the Respondent specifically the “release and discharge” is not genuine and the court's finding that the Applicant has not provided evidence of the forged documents was therefore incorrect.



20. Relatedly, the Respondent had not filed a copy of the national identification card the Claimant/Applicant allegedly used to secure employment.
21. It is trite law that a party aggrieved by a decision or order of a court may apply for review subject to the relevant rules and restrictions.
22. Section 80 of the *Civil Procedure Act* provides for the power of review while Order 45 of the Civil Procedure prescribes the rules.
23. The provisions of Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016 mirrors the provisions of Order 45(1) of the Civil Procedure Rules, 2010.
24. The grounds on which an application for review can be made are;
 - a. discovery of new and important matter or evidence which after exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;
 - b. on account of some mistake or error apparent on the face of the record, or
 - c. for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.
25. In Republic V Advocates Disciplinary Tribunal Ex parte Appollo Mboya (2019) eKLR, Mativo J. (as he then was) stated as follows:

“ . . . It will not be a sufficient ground for a review that another judge could have taken a different view of the matter nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review. (National Bank of Kenya Ltd V Ndung’u Njau (1996) KLR 469) . . .

The power of review is available only where there is an error apparent on the face of the record. I emphasise that review proceedings are not an appeal. The review must be confined to error apparent on the face of the record and re-appraisal of the entire evidence or how the Judge applied or interpreted the law would amount to exercise of appellate jurisdiction which is not permissible.”
26. Since the Applicant is challenging a finding of fact made by the court, the court is persuaded that the Applicant’s application for review is a disguised appeal against the ruling.
27. (See also Evan Bwire V Andrew Nginda (2000) LLR 8340, Sadar Mohamed V Charan Singh & another (1963) EA, Abasi Belinda V Fredrick Kangwamu & another (1963) EA 557, Attorney General & others V Byanyima (8) HCMA No. 1789 of 2000, Nyamongo & Nyamongo V Kogo (6) (2000) EA 170 among others).
28. In light of the foregoing, the court is satisfied that as the Claimant/Applicant’s Notice of Motion for review is not based on any of the grounds set out in Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016, the same is ripe for being struck out and it is accordingly struck out.
29. As regards recusal, the Claimant maintains that he is apprehensive that the final judgment may suffer the fate of the application dated 26th November, 2023 leading to a compromised judgment.



30. The Claimant appears convinced that the finding that he has not provided evidence of the alleged forgery was wrong.
31. Significantly, the Respondent's evidence is yet to be adduced and cross-examined but the Applicant believes that the Judge will not be impartial having ruled against him.
32. Under Regulation 21 Part II of the Judicial Service (Code of Conduct and Ethics) Regulations 2020, 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;
- a. Is a party to the proceedings.
 - b. Was or is a material witness in the matter in controversy.
 - c. Has personal knowledge of disputed evidentiary facts concerning the proceedings.
 - d. Has actual bias or prejudice concerning a party.
 - e. Has a personal interest or is in a relationship with a person who has a personal interest in the outcome of the matter.
 - f. Has previously acted as a counsel for a party in the same matter.
 - g. Is precluded from hearing the matter on account of any other sufficient reason; or
 - h. A member of the Judge's family has economic or other interest in the outcome of the matter in question.
33. Regulation 9 of the Code of Conduct underscores in mandatory tone the centrality of impartiality of a Judge as follows:
- A judge shall at all times carry out the duties of the office with impartiality and objectivity in accordance with Articles 10, 27, 73(2)(b) and 232 of *the Constitution* and shall not practice favouritism, nepotism, tribalism, cronyism, religious and cultural bias or engage in corrupt or unethical practices.
34. The foregoing position is fortified by the sentiments of the Court of Appeal in R V Jackson Mwalolu & others Civil App No. 310 of 2024 as follows;
- “... 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 mind of the public at large a reasonable doubt about the fairness of the administration of justice.
- That the test is objective and the facts constituting bias must be specifically alleged and established...”
35. In the court's view, the Applicant appears convinced that he is unlikely to get justice in court and unpersuaded that the Judge handling the case will determine the same fairly if the last ruling is anything to go by and being a self-litigant, and having talked to him severally in light of the numerous applications he has made since the suit was filed in 2021, the court is persuaded that there is nothing more it can do to assuage the Applicant than grant his wish for justice to be seen to be done in this case.
36. Consequently, the Applicant's Notice of Motion dated 10th March, 2024 is granted in the following terms;



- a. The Judge hereby disqualifies himself from the instant case.
- b. Each party shall bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 10TH DAY OF JULY 2024

DR. JACOB GAKERI

JUDGE

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

