REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. E576 OF 2020

(Before D.K.N. Marete)

SAMSON NYAMAI MASILA ……CLAIMANT

VERSUS

ATHI WATER WORKS DEVELOPMENT AGENCY & ANOTHER…….RESPONDENT

RULING

This is an application dated 30th September, 2020 and seeks a recusal of the presiding judge from any further conduct and proceedings in this matter. It also seeks that the file be placed before the Presiding Judge (read Principal Judge) for re-allocation to another judge.

The application is supported on grounds as follows;

- That the suit come for hearing on 16th June, 2025 after a number of aborted hearings and the claimant was sworn in and began to testify in chief.
- That barely minutes into the testimony the court would pause the proceedings in a deportment of the claimant's line of testimony regarding the character, personality and reappointment of the 2nd Respondent in the parties initial interactions.
- Seemingly, the Court was as at that moment not fully apprehended of the nature of the claim – sexual amassment and called for amicable settlement to obviate a public altercation by parties who were advocates.
- On a report of a stalemate in negotiation for settlement, the court was of the view that parties should try harder despite agitation by the Respondents of their readiness to proceed.

The Claimant further ushers in the following to support his application;

xvi. *The totality of this, that is, the Learned Judge's hard stance on the Claimant even in the face of the Respondent's vehement disinclination to any further negotiations, the failure to caution Counsel and generally the Learned Judge's remarks, would create the apprehension that the Learned Judge had a certain perspective or prejudice and personal or societal bias against Claims of sexual harassment generally and in particular, the case before him.*

xvii. *While the Claimant has no apprehension of impropriety on the part of the Judge, the Claimant, nevertheless, bears a very reasonable apprehension that the Judge has an ingrained cultural, social, societal or personal bias and prejudice against the Claimant's case that is likely to impede the Judge's objectivity in deciding on the matter.*

xviii. *The Court has laid bure and expressed its feelings, perspectives and even made remarks about likely outcomes on quantum, which impairs impartiality and preempts the decision of the Court.*

xix. *In the totality of the circumstances, the Claimant's confidence in the Court's impartiality has been so impaired and weakened that he will still have lingering doubts whatever decision the Court makes and whichever way it learns.*

xx. *Accordingly, the Claimant has reasonable apprehension that the Court may not likely sit as a neutral arbiter and consider the issues objectively, impartially and free of bias.*

The Respondents opposes the application. They disclaim a numerously of adjournments and acknowledge only four (4), one of which was occasioned by their appointment of additional counsel who needed time for familiarise himself with the matter.

The Respondents further acknowledges a pause of the proceedings but disagree that this was in disapproval of the evidence of the claimant. Instead, this is articulated to the wisdom of the court in allowing the parties to seek any form of Alternative Dispute Resolution methods in line with Article 159 (2) (c) of the Constitution.

It is the Respondent's other submissions that attempts at conciliation and an out of court settlement were had and meeting held *inter partes* but these aborted due to the non-co-operation of the claimant prompting the 2nd Respondent's instruction to his counsel to set the matter for hearing.

The 2nd Respondent avers that the failure and frustration of the conciliation exercise should be fixed onto the claimant and not the court as alluded by the claimant at paragraphs 11 and 13 of their supporting affidavits. The court awarded all the parties time to express themselves on the now failed reconciliation exercise and at no point did the court express itself on the issues at hand. Therefore, no bias is apparent or deducible has claimed by the claimant at paragraphs 7, 15 and 23 of the supporting affidavit. This is as follows;

a. *The Judge never at any point attributed responsibility of the inability to resolve this matter amicably on any of the parties.*
b. *At no point did this … court expressly or impliedly suggest that the Claimant should abandon any of his Claim.*
c. *At no point did the court mention anything to do with quantum payable to the claimant in respect of this matter.*

Indeed, no actual or perceived bias has been established by the claimant whatsoever in their affidavit or evidence.

The Respondent also faulted for delay in filing and serving in time of the application for recusal well knowing that the matter was set for hearing on 8th October, 2023. This is as follows;

> 26. *THAT on 17th July 2025, the court set down this case for a further hearing on the 8th October 2025 and it was not until 3rd of October 2025 that it occurred to the Claimant that he needed to file the application for the honourable judge to recuse himself. (I now attach a printout of the CTS for this case and more particularly the Documents page and mark the same 'EK5').*

This application therefore comes out as on afterthought and a delay tactic by the claimant to keep the Respondents in court for endless times and should be discouraged and snubbed by this court.

The critical ingredients of an application for recusal are evidence of actual bias or perceived bias. These have not been demonstrated by the claimant/applicant in evidence. The claimant has mainly relied on misrepresentations and falsehoods on the character and conduct of this court as relates to these proceedings.

A court's reference or attempts at Alternative Justice Systems or even Alternative Dispute Resolution mechanisms is not in itself a matter of bias as to warrant an application for recusal. If anything, this should be encouraged as practice in the letter and spirit of Article 159 (2) (c) of the Constitution of Kenya, 2010. This offers best practices even in other concurrent jurisdictions and should not be frowned upon. It should instead be nurtured, accommodated and appreciated.

The Claimant/Applicant has demonstrably failed to establish the requisite threshold for a case of recusal. This arises where a party to litigation experiences genuine fear of bias on the part of the presiding judge or court due to its conduct in the matter. This must be well established in

evidence. It would be chaotic if courts entertained or even allowed whimsical applications for recusal.

I am therefore inclined to disallow the application with orders that parties bear their costs of the same.

Delivered, dated and signed this 11th day of November 2025.

D. K. Njagi Marete
JUDGE

Appearances:

1. Mr Masila – Claimant in person
2. Miss Orege instructed by State Law Office for the 1st Respondent
3. Miss Mwinzi instructed by Keli Mwinzi Advocates for the 2nd Respondent.