



Chirchir & 39 others v Government of West Pokot & 2 others (Cause E002 of 2023) [2025] KEELRC 1024 (KLR) (28 March 2025) (Ruling)

Neutral citation: [2025] KEELRC 1024 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KITALE
CAUSE E002 OF 2023
MA ONYANGO, J
MARCH 28, 2025

BETWEEN

DOREEN JEMOSOP CHIRCHIR & 39 OTHERS CLAIMANT

AND

GOVERNMENT OF WEST POKOT 1ST RESPONDENT

COUNTY SECRETARY, COUNTY GOVERNMENT OF WEST POKOT 2ND RESPONDENT

WEST POKOT COUNTY PUBLIC SERVICE BOARD 3RD RESPONDENT

RULING

1. Before this court for determination are two applications. I will refer to the two applications as the first and second applications respectively.
2. The first application is dated 13th November 2024 and is filed by the County Solicitor of the 2nd Respondent. The application is expressed under the provisions of section 3 of the ELRC Act, Judicial Service (Code of Conduct and Ethics) Regulations, Articles 10, 47, 50 and 159 of *the Constitution* and the Bangalore Principles of Judicial Conduct. It is couched in the following terms: -
 - a. Spent
 - b. That this court be pleased to disqualify itself from any further conduct of this matter
 - c. That this court be pleased to place this file before the Principal Judge of the ELRC for reallocation to another Judge for its just and conclusive determination
 - d. That this court be pleased to stay the Ruling scheduled to be delivered by Honourable Lady Justice Maureen Onyango on the 28th of November, 2024.



- e. That this court be pleased to discharge/set aside all orders issued herein by the Honourable Lady Justice Maureen Onyango.
 - f. That costs of this application be in the cause.
3. The application is premised on the grounds on the face thereof and the Supporting Affidavit of Jonathan Siwanyang, the County Secretary, West Pokot County Government and 1st Applicant in the application, sworn on 13th November 2024.
 4. In the Supporting Affidavit Mr. Siwanyang deposes that pursuant to an application dated 7th February 2023 filed with the main cause Justice J.N. Abuodha issued directions on the disposal of the application and granted an ex parte temporary injunction on the 15th of February 2023 staying the coming into effect of the one-month termination notices dated the 3rd of January, 2023 issued to the Claimants by the Respondents as from 16th January, 2023.
 5. It is the Respondent's case that the said claims were filed in clear contravention of the exhaustion principle and in particular, section 77 of the County Governments Act and section 87(2) of the Public Service Act which require that any claim for wrongful termination and/or claim for salaries by an employee against a County Government must in the first instance be filed at the Public Service Commission.
 6. It is averred that on 20th March 2023, the Respondents filed a Preliminary Objection challenging the jurisdiction of this Honorable Court to entertain the main claim but this court has on several occasion declined to hear the said Preliminary Objection and as at the time of filing this application it is yet to determine it.
 7. According to the Respondents, the Claimants vide a notice of motion dated 17th March, 2023 instituted contempt proceedings against the County Secretary, the County Attorney and the Department Human Resource, Department of Water and Environment West Pokot County allegedly for denying the Respondents access to their work stations. That in its ruling, the court found that the alleged Contemnors were not in contempt but went ahead to direct the deponent to personally ensure that the orders of this Court issued on 15th February, 2023 were obeyed by the Respondents failing which the court will not shy away from holding him in contempt.
 8. It is further contended that on the 7th February 2024, the 3rd Respondent advertised 159 vacant positions in the County Public Service in addition to and not in substitution of those held by the Claimants, that the Claimants who are 40 in number, moved this Honorable Court vide an application dated 26th February, 2024 seeking injunctive orders which would in effect restrain the 3rd Respondent from carrying out the entire recruitment process whether or not it affected the Claimants positions.
 9. The Respondents assert that despite lacking jurisdiction to entertain such an application and without first examining whether indeed it is vested with the requisite jurisdiction, this Honorable Court went ahead to pronounce itself on the matter on 28th May, 2024, and in consideration of extraneous matters that were not the subject of the said application, held the 1st, 2nd and 3rd Respondents to be in contempt of its orders dated 15th February 2024, the 11th December 2023 and 27th February 2024. That the court ordered the Respondents to file affidavits by heads of departments in which the Claimants are deployed to confirm that they had been given work in their respective positions and that they were earning salary with proof of the deployment and allocation of work and payment of salary before any further directions by this Court. Further, that the court ordered the ongoing recruitment to be suspended until the Respondents confirmed that the Claimants had been deployed, allocated work and paid.



10. The Respondents contend that by ordering them to pay the Claimants salaries before first determining the application dated 7th February 2023 of the main cause, the court acted unprocedurally and irrationally. It is on this basis that the Respondents aver that they are apprehensive that the court has a preconceived determination of the applications under its consideration and should thus recuse itself from further conduct of this matter.
11. The application is opposed. The Claimants filed a Replying affidavit sworn by Ambrose Ruto Tiamale, the 31st Claimant, on 26th December 2024. The Claimants term the Respondents' application dated 13th November 2024 as having no merit, frivolous, vexatious and a blatant abuse of the court process. It is the Claimants' position that disqualification of a judge in a case is a serious matter and should not be used by parties to shop for judges to hear their cases as the entire justice system will come to a halt. According to the Claimants, the Respondents are seeking the court to disqualify itself from hearing the case since they were denied the orders they were seeking.
12. It is the Claimants' case that the instant application is akin to a tantrum by the Respondents after not getting away with their impunity and blatant violation of fair labour practices and non-discrimination of civil servants on political grounds. In addition, it is contended that the instant application is malicious as it intends to avoid lawful payment of salaries to employees the Respondents perceive are "illegal" as they were hired by the previous regime contrary to the provisions of the law.
13. The Claimants aver that the Respondents filed this application immediately before a ruling by this Honourable Court on a contempt application against the 1st Respondent herein and accounting officer for the 2nd Respondent charged alongside the Secretary to the County Public Service Board. That the instant application is a way of intimidating the court in a bid to circumvent justice.
14. According to the Claimants, the orders issued by this court on 28th May, 2024 were a culmination of other prior orders, being orders issued on 15th February 2023, 30th November 2023 and 27th February 2023 which the Respondents were willfully disobeying.
15. The Claimants aver that the instant application does not meet the threshold for grant of orders sought by the Respondents as they ought to have established material facts that relate to personal inclination or prejudice on the part of the judge towards a party.
16. In the end, the Court was urged to dismiss the application dated 13th November 2024 with costs and the matter be scheduled for determination from where it has reached in the interest of justice.
17. On 27th November 2024, the court directed parties to canvass the application by way of written submissions. I have perused the record and only found submissions for the Claimants dated 6th January 2025.
18. In their submissions, the Claimants identified the issues for determination to be: -
 - i. Whether the Respondents have met the threshold test on bias;
 - ii. Whether or not the orders sought in the application should be granted.
19. On the first issue, the Claimants submit that for a litigant to successfully seek the recusal of a judicial officer, the application should not be frivolous as this would be tantamount to forum shopping or a delaying tactic to slow down the wheels of justice unjustifiably at the expense of judicial time and interests of the opposing party who is often prejudiced. It is the Claimants submission that the Respondents have not met the threshold in law as they have made mere allegation that are not founded on facts as to why they seek the recusal of the judge in this matter. In this regard, it is submitted that



the instant application for the court's recusal is frivolous, flimsy and lacking in merit and ought to be dismissed with costs.

20. On the issue of costs, the Claimants prayed that the same be granted to them upon the dismissal of the application.

The Second Application

21. The second application is dated 11th December 2024 and was filed by the Claimants against the Respondents seeking the following orders: -
- i. Spent
 - ii. Pending the hearing and determination of this application inter-partes a temporary injunction be and is hereby issued staying the declaration of vacancies dated 27th November 2024.
 - iii. Pending the hearing and determination of this application inter-partes a temporary injunction be and is hereby issued restraining the 3rd Respondent, their agents, servants and any person whatsoever from conducting interviews and/or recruiting new employees vide the declaration of vacancies dated 27th November 2024.
 - iv. Pending the hearing and determination of this application inter-partes a temporary injunction be and is hereby issued restraining the Respondents, their agents, servants and any person whatsoever from declaring a vacancy in the offices of the Claimants, advertising out any interviews and/or recruiting or employing any person to replace the Claimants.
 - v. Pending the hearing and determination of this Claim this Honourable court be pleased to issue a temporary injunction restraining the Respondents, their agents, servants and any person whatsoever from terminating and/or demoting the Claimants from their current positions as employees of the 1st Respondent.
 - vi. Pending the hearing and determination of this Claim this Honourable court be pleased to issue a temporary injunction restraining the Respondents, their agents, servants and any person whatsoever from declaring a vacancy in the offices of the Claimants, advertising out any interviews and/or recruiting or employing any person to replace the Claimants.
 - vii. Costs of this application be provided for.
22. The application is grounded on the reasons stated on its face and supported by the sworn affidavit of Ambrose Ruto Tiamale dated 11th December 2024. It is deposed that at all material times to this cause, the Claimants were employed by the 1st Respondent in various positions as from 1st April 2022 and 1st May 2022 on contractual terms for a period of two (2) or three (3) years.
23. The Claimants aver that the Respondents were intent on terminating their employment unlawfully for demanding their salary arrears and issued one-month termination notices to them dated 3rd January 2023 whereupon they moved this court and the court vide order issued on 15th February 2023 stayed the one-month termination notices. It is contended that vide a ruling delivered on 30th November 2023, this court directed the 1st Respondent to comply with the orders issued on 15th February 2023 and to release the Claimants' salaries.
24. It is the Claimants contention that the Respondents in violation of the orders of this Court subsisting, declared vacancies which were to close on 28th February 2024 as a result of which the Claimants filed an injunction application which is pending ruling before this Court.



25. The Claimants state that the Respondents have now issued a fresh declaration of vacancies dated 27th November 2024 seeking to fill the positions of some of the Claimants herein as a result of which the Claimants will suffer irreparable damage if the declaration of said vacancies is not stayed by this Court.
26. According to the Claimants, the Respondents have shown utmost impunity in the handling of the Claimants who they are now intend on dismissing constructively by hiring new staff to replace them yet the suit is yet to be determined on merit by the Court.
27. In response to that application, the Respondents filed a Replying Affidavit sworn on 20th January 2025 by Consolata Arusei, the 3rd Respondent's County Secretary in which she deposes that the positions of the Applicants are secured by this honorable court's order dated 15th February, 2023 which stayed the coming into effect of the one-month termination notices dated 3rd January, 2023 issued to them on 16th January, 2023.
28. The Respondents contend that in accordance with the court orders, the 2nd Respondent has deployed and assigned duties to all the Claimants and that should the recruitment as per the declaration of vacancies dated 27th November, 2024 proceed, none of the Claimants stands to suffer any damages.
29. It is the Respondents averments that in the event that any Claimant suffers any damage they would be adequately compensated by an award of damages and that conversely were the orders sought by the Claimants issued, the residents of West Pokot and the neighboring counties that rely on health care services provided by the 2nd Respondent stand to suffer irreparable damage that cannot be remedied by way of damages.
30. The Respondents urged the court to take judicial notice of the need to improve health care services in Kenya in general, the changes being effected in the health care sector in the country and, in particular, the implementation of the Social Health *Insurance Act* No. 16 of 2023 and Digital *Health Act* No.15 of 2023 which has necessitated the recruitment of 234 additional staff in the Department of Health and Sanitation.
31. It is stated that the recruitment as per the declaration of vacancies dated 27th November, 2024 is aimed at improving health care services in West Pokot County and that it is fair, just and convenient that the application dated 11th December, 2024 is dismissed with costs.
32. On 27th January 2025, counsels for the respective parties argued the application orally in court reiterating the positions of parties as detailed in the rival affidavits. The court has taken into consideration the said submissions.

Determination

33. I will start by considering the Application dated 13th November 2024, because if it is successful I will have to send the file to the Principal Judge to appoint a different Judge to hear and determine the second application and the rest of this suit.
34. In the said application dated 13th November 2024, the only issue that arises for determination is whether the Respondent's application for my recusal is merited.
35. In exercising the mandate of adjudication, Judges are required to observe certain fundamental principles, some of which have been codified under the Judicial Service (Code of Conduct and Ethics) Regulations, 2020 under the *Judicial Service Act* . Under Regulation 21 Part II of the said Code of Conduct, a Judge ought to 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. Had 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. Or a member of the Judge’s family has economic or other interest in the outcome of the matter in question.
36. Regulation 9 of the Judiciary Code of Conduct emphasizes the importance of impartiality of a Judge in the following terms:

A Judge shall, at all times, carry out the duties of the office with impartiality and objectively in accordance with Articles 10, 27, 73(2)(b) and 232 of *the Constitution* and shall not practice favoritism, nepotism, tribalism, cronyism, religious and cultural bias, or engage in corrupt or unethical practices.

37. The threshold for recusal was laid down in the English case of Metropolitan Properties (Fg-C) Ltd v Lannon & Others [1969] 1 QB 577 as follows:

“Disqualification was imperative even in the absence of a real likelihood of bias if a reasonable man would reasonably suspect bias.” Acker LJ in R v Liverpool City Justices, ex parte Topping [1983] 1 WLR 119 elaborated on the test applicable. The Court has to address its mind to the question as to whether a reasonable and fair-minded man sitting in Court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible. If the answer is in the affirmative, disqualification will be inevitable.”

38. The Court of Appeal in Kaplana H. Rawal v Judicial Service Commission & 2 others (2016) eKLR remarked:

“... An application for recusal of a judge is a necessary evil. On the one hand it calls into question the fairness of a judge who has sworn to do justice impartially, in accordance with *the Constitution* without any fear, favour, bias, affection, ill-will, prejudice, political, religious, or other influence. In such applications, the impartiality of the judge is called into question and his independence is impugned. On the other hand, the oath of office notwithstanding, the judge is all too human and above all *the Constitution* does guarantee all litigants the right to a fair hearing by an independent and impartial judge... 25. The Supreme Court of Canada expounded the test in the following terms in R. v S. (R.D.) [1977] 3 SCR 484: “The apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. This test contains a two-fold objective element: the person considering the alleged bias must be reasonable



and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold...”

39. In the instant case the Applicant’s complaint is that I have refused to hear its application contesting the jurisdiction of this court to hear this case. In the supporting affidavit of Mr. Siwanyang, he states that I have a preconceived determination of the suit herein and the pending applications.
40. Mr. Siwanyang has stated what he expected to be my decision in the applications and concluded that because my decisions did not conform with his expectations, I must be biased.
41. As correctly stated at paragraph 38 of the supporting affidavit of Mr. Siwanyang, this court’s position has been consistent, that the Respondents ought to comply with court orders issued by my Brother Justice Abuodha J.N dated 15th February, 2023 before they can have audience of this court in their application dated 20th March 2023. Had the Respondents complied from the very beginning with the orders dated 15th February, 2023, their Preliminary objection dated 20th March, 2023 would have been heard and disposed of a long time ago. They have however persisted in disobeying the said court orders while at the same time insisting that their application dated 20th March, 2023 must be heard.
42. As was stated by the Court of Appeal in *Gulabchand Popatlal Shah & Another Civil Application No. 39 of 1990*, (unreported): -

“ It is essential for the maintenance of the Rule of Law and good order that the authority and dignity of our courts are upheld at all times. This court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors”

In *Hadkinson v Hadkinson* [1952] 2 All ER. 567, it was held that: “It is plain and unqualified obligation of every person against or in respect of, who an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.” [Emphasis added]
43. The Respondents have taken the position as stated at paragraph 10 of the affidavit of Mr. Siwanyang, that the orders issued by my Brother Abuodha J. did not (expressly or impliedly) direct the Respondents to pay salary. This position is to say the least absurd. What does an order staying the coming into effect of a letter of termination mean? In my understanding, it means that the employee remains in employment and as such, continues receiving salary and all other employment benefits.
44. The court further notes with concern that in the supporting affidavit the deponent has made submissions on how I should decide the application dated 26th February, 2024, which is pending determination, and has gone ahead to advise the court on how that application should be decided.
45. That is not how courts work. Frustration of a party at the fact that the court has failed to decide in its favour should not be confused with bias.
46. Further, a party who is aggrieved by any decision of a court is well advised to apply for review or appeal against such decision, an option which the Applicants have not preferred in the instant case.



47. The timing of the application is also material. The application sought to stay the ruling of this court on a contempt application against the Respondents which was scheduled to be delivered on the 28th of November, 2024. The instant application was filed on 13th November 2024.
48. Suffice to state that none of the grounds in Regulation 21 Part II of the said Code of Conduct apply to me. I do not know the parties herein nor do I have any bias or reason to be biased, against any of the parties. The orders in question were not issued by myself, but by my brother Abuodha J.N who was presiding over this court before I took over upon his transfer.
49. In concluding on this matter, I want to associate myself with the sentiments of the court in the case of Nathan Obwana v Robert Bisakaya Wanyera & 2 others [2013] eKLR, where the Court stated as follows:
- “I do find that there has been no proof of bias. The apprehension by the applicant that he will not get justice in this court is a normal apprehension whereby each party who has a matter in court is apprehensive as to the decision the court would make. The court may find in his or her favour and that uncertainty makes parties to be apprehensive. If a party interprets his apprehension and conclude that the court would be biased then that is taking the wrong dimension unless allegations of bias are proved by facts. The aspect of judging encompasses the unpredictability of the decision. If that aspect is missing then parties will be able to make their own predictions and make conclusions as to how the court is likely to decide a matter.”
50. I accordingly dismiss the application dated 13th November 2024 on grounds that it has no merit.

Second application

51. Turning to the Claimants’ application dated 11th December, 2024, the issue for determination is whether the Applicants merit the conservatory orders sought therein.
52. As submitted by the Respondents, the Claimants are 40 in number while the positions sought to be filled by the Respondents in the impugned advertisement are 159 vacancies. As demonstrated by the Respondents, not all the positions advertised are similar to the positions held by the Claimants.
53. As pointed out by Mr. Magal for the Respondents, the Claimants are only concerned with items no. 40 and 41 in the list of the jobs advertised which according to the Claimants, would affect only 8 of them.
54. Mr. Magal further pointed out that the vacancies advertised are in the Department of Health and Sanitation and not in the departments in which the Claimants are deployed.
55. Mr. Magal further submitted that the positions the Claimants refer to as “administrators” which they claim would affect some of them are in actual fact for “system administrators” which is a different position as demonstrated by the letters of appointment of 6 of the Claimants who the Claimants alleged would be displaced by the filling of the vacancies.
56. It was further pointed out that item 41 in the advertisement which the Claimants aver will affect 2 of them are positions for accountants within the department of Health and Sanitation while the Claimants who are accountants are attached to different departments as demonstrated by their deployment letters produced by the Respondents.
57. Further, as pointed out by the Respondents, the Claimants have orders of this court that protect them from termination of their employment.



58. From the foregoing I find that the Claimants have not demonstrated that there is a nexus between the positions they hold and the positions that have been advertised by the Respondents. The Claimants have not demonstrated that the filling of the positions advertised by the Respondents will lead to the constructive termination of the employment of some of them by being replaced through a fresh round of recruitments.
59. The principles for grant of temporary injunctive orders as set out in the case of *Giella v Cassman Brown Co. Ltd* [1973] E.A 358. are first, that the Applicant must demonstrate that there is a prima facie case with probability of success. Secondly, that the Applicant will suffer irreparable loss should the orders not be granted and thirdly, that when the Court is in doubt, the application would be determined based on a balance of convenience.
60. To succeed in an application for temporary injunction an applicant must fulfill both the 1st and 2nd principles to be entitled to an injunctive order.
61. Taking into consideration the circumstances of this case, I find that the Claimants have not established a prima facie case to warrant the granting of the orders. I therefore do not have to consider the other principles for grant of injunctive orders.
62. For the forgoing reasons I find no merit in the application dated 11th December 2024 and dismiss the same.
63. Each party shall bear its costs in the two applications.

DATED, DELIVERED AND SIGNED AT ELDORET THIS 28TH DAY OF MARCH, 2025.

M. ONYANGO

JUDGE

