



Mohamed & 2 others v Pothiwala t/a Sangoro Boat Services (Employment and Labour Relations Cause E019 of 2024) [2024] KEELRC 2338 (KLR) (26 September 2024) (Ruling)

Neutral citation: [2024] KEELRC 2338 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
EMPLOYMENT AND LABOUR RELATIONS CAUSE E019 OF 2024**

**M MBARÚ, J
SEPTEMBER 26, 2024**

BETWEEN

**SALIM SAID MOHAMED 1ST APPELLANT
CHENGO KAZUNGU NGOWA 2ND APPELLANT
ALI MHAMAD MAVUNE 3RD APPELLANT**

AND

KHUZEMA POTHIWALA T/A SANGORO BOAT SERVICES RESPONDENT

RULING

1. There are several applications filed by persons represented by the firm of Mung'oma Mung'oma & Company Advocates all generic and seeking similar orders. There is a ruling in each such file but the issues raised being similar, a similar ruling is hereon found necessary save for differences in the affidavits filed and submissions made under each file.
2. These files include this file together with Mombasa ELRCA No. E038 of 2024, ELRCA E136 of 2023, and ELRCA E012 of 2024.
3. In this file, the subject application is dated 15 April 2024 supported by the 1st appellant's affidavit and under the provisions of Sections 50(1) and 47 of *the Constitution*, Sections 1A and 1B of the *Civil Procedure Act* and Section 3 of the *Employment and Labour Relations Court Act* and seeking orders;
 1. This court be pleased to stay any further proceedings in this matter pending the hearing and determination of this application.
 2. The Honourable Justice Monica Mbaru be pleased to recuse and or disqualify herself from hearing and determining this suit.
 3. Costs of this application be in the course [cause].



4. The application is supported by the affidavit of the 1st appellant who avers that in this case, he is represented by the firm of Mung'oma Mung'oma & Company Advocates which has represented other parties before this court. He is aware that where such claims have been allowed or succeeded partially the award is reviewed insignificantly even where the court finds there was unfair termination. He has reasonable doubt about the fairness of the administration of justice before this court.
5. He avers in his affidavit that the continued hearing of this matter by this court would be a violation of his constitutional right to a fair hearing by an independent court and impartial court. The firm of Mung'oma Mung'oma & Company Advocates has served protest letters to the Judicial Service Commission (JSC) against the conduct of this court. The protest letters have equally been served to this court and the JSC is yet to respond. There is the likelihood that this court shall be biased against him and infringe on his rights to a fair hearing as enshrined under Article 50(1) of *the Constitution* for being represented by the firm of Mung'oma Mung'oma & Company Advocates his preferred advocate
6. He avers that he is apprehensive that serious prejudice shall be occasioned if the orders sought are not granted since justice must not only be done but also seen to be done. There is a need for the court to recuse itself to allow another court to hear the matter on merit without any form of bias.
7. The respondent filed Grounds of Opposition that;
 1. The application as drafted is bad in law and frivolous.
 2. The grounds set out in the Notice of Motion dated 17 [15] April 2024 do not qualify for the grant of recusal.
 3. The applicants have not demonstrated the alleged bias to entitle to the grant of orders of recusal.
8. Both parties attended and filed written submissions.
9. The appellants submitted that under Article 50(1) of *the constitution*, they are guaranteed of a fair trial by an independent and impartial court. Where the judicial officer exhibits bias or impartiality, this constitutional guarantee is eroded. Under Rule 5 of the Judicial Code of Conduct the circumstances that warrant for recusal have been addressed relating to a judicial officer who has personal biases or prejudice concerning a party before him, has served as a lawyer in the matter in controversy. In this case, the appellants contends that there exists bias concerning the court and their advocates. The firm of Mungoma and Mungoma & Company Advocates has represented several parties before this court who have expressed their reservations over the quality of judgments they obtained from this court where these litigants were unfairly targeted.
10. The appellants submitted that they are aware of judgments that their advocates have obtained following which a complaints has been filed to the Judicial Service Commission. Whereas the aggrieved parties have the right of appeal, an injustice should not be left to be perpetuated. There is a likelihood that this court will be biased as the appellants are represented by the same advocates as held in *Kalpana Rawal v Judicial Service Commission & 2 others [2016] ECLR*.
11. The respondent submitted the appellants are seeking for recusal of the presiding judge for reasons that the Judge's orders and decisions in previous matters have been prejudicial towards the parties represented by their advocates, the firm of Mungoma Mungoma & Company advocates. However, the appellants have not demonstrated the alleged bias to entitle them to the orders sought.
12. Under Regulation 21 Part II of the Judicial Service (Code of Conduct and Ethics) Regulations 2020, a Judge can recuse herself in any proceedings in which her impartiality might reasonably be questioned



due to actual bias or prejudice concerning a party or had previously acted as a counsel for a party in the same matter. In the case of *Jan Bonde Nielsen v Herman Philipus Steyn & 2 others* [2014] eKLR the court applied the test for disqualification of a judge from presiding over a matter and held that this can only arise where there is a reasonable ground for assuming the possibility of a bias and there is likely to produce in the minds of the public a reasonable doubt about the fairness of the administration of justice.

13. In the case of *Philip K Tunoi & another v Judicial Service Commission & another* [2016] eKLR the court held that the question of whether a fair minded and informed observer, having considered the facts would conclude that there was real or perceived bias must be real and not assumed. In this case, the appellants allege that the presiding Judge is biased on the grounds that Mombasa ELRC E009 of 2023 and ELRCA E023 of 2023 and ELRCA E127 of 2023 the court was biased, however, each case is separate and based on its facts. The apprehension by the appellants has no basis or good foundation and there is no determination that is taken to suggest there is biased in their case. In the case of ***Gachuri v Attorney General & another; Kenya Judges Welfare Association & another (Interested parties)*** [2024] eKLR the court held that mere apprehension on the part of a litigant that a judge will be biased, even a strongly and honestly felt anxiety is not enough. Each case must be heard on the merits and the instant application should be dismissed with cost.

Determination

14. The case by the appellants is that there should be recusal of the judge since they has been made aware that the firm of Mung'oma Mung'oma & Company Advocate has represented other respondents before this court and that these appeals have been allowed thus dismissing a claimant's case and where the appeals succeed partially the award is reviewed insignificantly even where the court finds there was unfair termination. The case is also that the respondent has reasonable doubt about the fairness of the administration of justice before this court. The continued hearing of this matter would be a violation of the respondent's constitutional right to a fair hearing by an independent and impartial court. The appellants further asserts that the firm of Mung'oma Mung'oma and Company Advocates has represented other respondents before this court who have expressed their reservations over the quality of judgments they obtained from this court.
15. The appellants as the applicants have a right to be represented by an advocate of choice. This right is secured under Section 20 of the *Employment and Labour Relations Court Act* read together with Article 48 of *the Constitution* on access to justice.
16. The apprehension in this appeal is that the appellants chosen advocates have informed them that they have represented other litigants whose claims and appeals have been allowed thus dismissing a claimant's case and where the appeals succeed partially the award is reviewed insignificantly even where the court finds there was unfair termination of employment. The apprehension is also that if the matter proceeds before this court, there will be a violation of the right to a fair hearing.
17. In the case of *Kalpana Rawal v Judicial Service Commission & 2 others* [2016] eKLR and looking at the issue at hand, it related to allegations by the applicant that she had learnt from a confidential source that on the night of 5th and 6th February 2016 the presiding judge in a case where she was the applicant had held a meeting with the Attorney General, at which they discussed a pending appeal. There were allegations of an agreement that the appeal would be dismissed hence, in light of the said information, the applicant was apprehensive that the judge would not be fair and ought to recuse himself from hearing the appeal.



18. The Court of Appeal in the above-cited matter defined what constitutes “reasonable apprehension of bias” and relied on the case of Attorney General of Kenya v Prof Anyang’ Nyong’o & 10 Others EACJ Application *No. 5 of 2007* that;

We think that the objective test of “reasonable apprehension of bias” is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the mind of the reasonable, fair minded and informed member of the public that the judge did not (will not) apply his mind to the case impartially. Needless to say,

- (a) litigant who seeks disqualification of a judge comes to court because of his own perception that there is an appearance of bias on the part of the judge. The court however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair minded and informed about all the circumstances of the case.

19. In an application such as herein, an applicant bears the duty of establishing the facts upon which the inference is to be drawn that a fair minded and informed observer will conclude that the judge is biased. It is not enough to just make a bare allegation. Reasonable grounds must be presented from which an inference of bias may be drawn. What has the judge done or failed to do to create such a perception to the applicant? The appellant have not been before this court and in the exercise of the right to representation have been made aware that others before him had their appeals succeed and if not successful, the award was not substantial. Is this a proper foundation for bias on the part of the judge or a bias of the legal representative agitated by the appellants?
20. In *Rachuonyo and Rachuonyo Advocates v National Bank of Kenya Limited* [2021] eKLR an application such as herein was filed for recusal of the presiding judge. The applicant highlighted five (5) other matters that the judge had presided over and alleged that the judge was likely to be biased. The judge dismissed this application on the basis that the applicant had failed to demonstrate that he was a party in the cited matters so as to form a basis or perception that there would be bias in his case.
21. Indeed, judges in their judicial role are regulated by standards of conduct enacted in the Judicial Service (Code of Conduct and Ethics) Regulations 2020. Under Regulation 21 Part II, a Judge can recuse herself in any of the proceedings in which 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.



22. The appellants have not addressed these principles save to urge the court that there is information from the advocates that other litigants succeeded in their appeals and where the appeals were not successful, the awards were not substantial.
23. I agree with the appellants that although the advocates representing them are the same in other cases, each case is separate and distinct and based on different facts and any party dissatisfied with the decision is entitled to appeal. Indeed, there are appeals lodged from the cases cited and to go on any analysis of the findings would not aid justice. Further, merely because this court decided any of these cited cases does not automatically form a justified basis for recusal.
24. It would be improper for this court to proceed to justify the cited cases. Each appeal is addressed on the merits and the applicable law. A right of appeal is constitutional and lawful.
25. In determining a similar application as herein, the court in *Republic v Independent Electoral & Boundaries Commission & Another ex parte Coalition for Reforms and Democracy (CORD)* HC NRB Misc. Appl. No. 648 of 2016 [2017] eKLR held that;

To seek the recusal of a Judge from hearing a matter simply on the ground that he has determined a matter with similar facts is an implication that there is a likelihood that another Judge will arrive at a different decision. In my view, instead of subjecting another Judge of concurrent jurisdiction to an embarrassing situation of arriving at a different decision, parties ought to be advised by their legal counsel to appeal the decision instead and the law provides for mechanism for protection of a party while it is pursuing an appeal. By asking another Judge to hear the matter, based on recusal there would be an expectation that that other Judge may arrive at a decision different from the decision arrived at by the Court referring the matter. Whereas a Judge of the High Court is not bound by a decision of a Court of concurrent jurisdiction, to deliberately set out to have another Judge arrive at a different decision is in my view a manifestation of bad faith. If the matter were to be heard by a different Judge of concurrent jurisdiction and a different decision is arrived at there would be two conflicting decisions of the Court and the perception created would be that the Respondent chose a Judge who was sympathetic to its cause. If that were to happen the citizens of this Country would be led to believe that justice depends on a particular Judge rather than the rule of law and that belief would bring the whole judicial process into disrepute and embarrassment.

26. Similarly, in the case of *Gladys Boss Sholei v The JSC & Another* (2018) eKLR the Supreme Court relied on the case of *Simonson v General Motor Corporation* USDCP 425 RSupp574,578(1978) and held that;

Recusal and reassignment is not a matter to be lightly undertaken by a Distinct Judge, while in proper cases, we have a duty to recuse ourselves, in cases such as the one before us, we have a concomitant obligation not to recuse ourselves; absent valid reasons for recusal their remains what has been termed as a “duty to sit”.

27. From the above it is clear that the requirements of independence and impartiality of the judge must be counterbalanced by the judge’s duty to sit where no grounds of disqualification exist in fact or law as the duty in itself helps to protect the independence of our courts against manoeuvring by parties hoping to improve their chances of having a matter determined by a particular Judge as to gain forensic and strategic advantage through delay and interpretation of proceedings as was pointed by the supreme court in the holding by the Newzeland court of appeal in *Mnir-versus-Commissioner of Inland Revenue*(2007)3NZLR 495.



28. The court finds no factual or legal basis established for its recusal. The application dated 15 April 2024 is tantamount to seeking to stop this court from the conduct of judicial function and I consequently dismiss the same. Costs to abide the outcome of the appeal.

DELIVERED IN OPEN COURT AT MOMBASA THIS 26 DAY OF SEPTEMBER 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

