



REPUBLIC OF KENYA



**Poussard v Bradley Limited & 5 others (Cause 2465 of 2017)  
[2023] KEELRC 798 (KLR) (27 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 798 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2465 OF 2017  
M MBARŪ, J  
MARCH 27, 2023**

**BETWEEN**

**THIERRY POUSSARD ..... CLAIMANT**

**AND**

**BRADLEY LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**PAUL MUCHENE KINITHIA ..... 2<sup>ND</sup> RESPONDENT**

**GENE GRAND ..... 3<sup>RD</sup> RESPONDENT**

**GUERASSIM NIKOLOV NIKOLOV ..... 4<sup>TH</sup> RESPONDENT**

**PAUL WANDERI NDUNGU ..... 5<sup>TH</sup> RESPONDENT**

**RONALD KAMWIKO KARAURI ..... 6<sup>TH</sup> RESPONDENT**

**RULING**

1 The ruling herein relates to application dated 26<sup>th</sup> April, 2022 filed under the provisions of article 25(c), 27, 48, 50(1) and 159 of the [Constitution](#) and rules 17 and 22 of the [Employment and Labour Relations Court \(Procedure\) Rules, 2016](#) and the substantive orders sought are that;

1. Spent.
2. Pending the hearing and determination of the other prayers in this application the hon. Justice Monica Mbaru be pleased to disqualify and/or recuse herself from further proceedings with this matter or any further conduct of this matter.
3. This matter be placed before the Principal Judge of the Employment and Labour Relations Court for appropriate directions, regarding prayer 2 above.
4. Costs of the application be provided for.



5. This court to grant such further orders as the court may deem fit and expedient.
- 2 The application is supported by the annexed affidavit of Ronald Kamwiko Karauri the 6<sup>th</sup> respondent herein and on the grounds that the Presiding Judge has failed, refused and neglected to exhibit to the applicants a fair hearing by not setting their application dated 4<sup>th</sup> April, 2022 for hearing despite being certified urgent and there has been open bias against the applicants by the court giving priority and favour to the claimant's applications both written and oral while delaying or ignoring the applicants. The Judge has already condemned the applicants unheard through ruling delivered on 24<sup>th</sup> March, 2022.
- 3 In his Supporting Affidavit, Mr Karauri avers that as a respondent herein the respondents filed application dated 4<sup>th</sup> April, 2022 but the Judge has refused to set it for hearing despite the same having been certified urgent and hence rendering it nugatory. There is open bias and disregard of the subject matter in the application dated 4<sup>th</sup> April, 2022 where the court has failed to give hearing directions and hence there is a predetermined decision on the application. In the cumulative assessment of the applicants, the conduct of the Judge is that there is short time given to the applicants to file their responses and submissions, there are irregular and unusual directions in the application seeking review ad setting aside of the previous ruling thereby rendering the application otiose, failure to determine the said application before proceeding with the main case, the speedy manner, negative attitude and harshness has been visited against the applicants advocates during the entire hearing of this case would all lead to a reasonable person to believe and to an inevitable conclusion that the Judge is biased and actuated by secondary interests other than that of administration of justice.
- 4 Mr Karauri also avers in his affidavit that the applicants have been condemned unheard and denied the opportunity to a fair and impartial hearing and in view of these matters, there exists special and peculiar circumstances to warrant the judge to recuse herself and to place the file before the Principal Judge for directions as otherwise the applicants shall suffer prejudice.
- 5 In reply, the claimant filed his Replying Affidavit and avers that he is the Decree Holder herein and the application by the respondents is only meant to scandalise the Judge with falsehoods and generalised accusations. The applicants were on numerous occasions heard by the court and given directions but chose not to attend court and comply with court directions. The applicants as respondents herein have treated the court with contempt and have never complied with orders issued by this court.
- 6 Judgment herein was delivered on 28<sup>th</sup> October, 2019 against the Judgement/Debtors who comprise the respondents and applicants herein and a decree issued on 6<sup>th</sup> October, 2020 for the sum of Kshs. 22,200,000 and costs assessed at Kshs. 799,834.95. The claimant instructed his advocates to proceed with execution as the Judgement-Debtors refused to pay or settle the court Decree despite having knowledge of the same. In the execution process, no assets of the Judgement/Debtor were recovered and the garnishee proceedings only resulted in recovery of ksh.3,321,092.82 and in the process of tracing the assets of the Judgement/Debtor it was discovered that immediately after judgment herein, monies were moved out well over Ksh.44 million from its accounts in a bid to frustrate the execution process and for this reason, there was good cause to lift the corporate veil and hence application dated 21<sup>st</sup> January, 2022 was filed.
- 7 The claimant also avers that he filed application dated 21<sup>st</sup> January, 2022 which was served on all respondents and when it came up for hearing 8<sup>th</sup> February, 2022 they remained absent and there are returns to confirm service. the court directed parties to file submissions by 21<sup>st</sup> February, 2022 and again, despite being served with notice, the respondents failed to attend and the court placed the matter for mention on 10<sup>th</sup> March, 2022 to confirm filed submissions and be allocated a date for ruling.



- 8 Upon being served with notice, on 3<sup>rd</sup> March, 2022 the respondents filed Grounds of Opposition and on 10<sup>th</sup> March, 2022 all parties including the respondents attended court and requested for more time to file their documents but failed to state when the subject application had been served to justify allocation of more time but were given until end of day to comply and ruling reserved for 24<sup>th</sup> March, 2022. No written submissions were filed by the respondents.
- 8 The claimant also avers that no party was condemned unheard as alleged by the applicants. there is evidence of serve at all stages. The claim that there were short notices does not arise.
- 9 On 4<sup>th</sup> April, 2022 when the matter came up for the applicants to confirm the statement of their accounts or to explain what assets existed to satisfy the decree herein they sought for 21 days to file the same and the matter placed for 26<sup>th</sup> April, 2022 to allow the applicants to file the statement of accounts.
- 10 On the due date, 26<sup>th</sup> April, 2022 the applicants did not attend court and had not complied as directed. The applicants had instead filed application dated 10<sup>th</sup> April, 2022 seeking to set aside the ruling delivered on 24<sup>th</sup> March, 2022 on the grounds that they had not been served with the subject application and hearing notice. application dated 4<sup>th</sup> April, 2022 has not been served as alleged.
- 11 The court then allowed the respondents as applicants in application dated 10<sup>th</sup> April, 2022 to get a hearing date at the registry which is normal and ordinary practice but instead on 4<sup>th</sup> May, 2022 the applicants served the claimant with the instant application dated 26<sup>th</sup> April, 2022 which is in abuse of court process, in contempt of court and should be dismissed with costs.
- 12 Both parties attended on 6<sup>th</sup> October, 2022 and agreed to address application dated 26<sup>th</sup> April, 2022 by way of written submissions.
- 13 The respondents as the applicants submitted that on 10<sup>th</sup> March, 2022 Counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents first attended court and asked for time to study the file but was directed to do so by close of business and ruling reserved for 24<sup>th</sup> March, 2022. The court then delivered ruling as scheduled and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents dissatisfied filed Notice of Appeal and application dated 10<sup>th</sup> April, 2022 which was certified urgent and fixed for mention on 26<sup>th</sup> April, 2022 but when the applicants sought for directions, the court instead directed the applicants to attend court on 5<sup>th</sup> May, 2022 to show cause why they should not be personally held liable to settle the decretal sum and to take a hearing date at the registry for their application.
- 14 Being aggrieved, the applicants have challenged these orders on the basis the court is biased and should recuse itself and to place the matter before the Principal Judge for directions.
- 15 The respondents therefore submitted the limited period within which they were given to reply and file submissions to application pending ruling on 24<sup>th</sup> March, 2022 was unreasonable as held in *Gideon Sitelu Konchellab v Julius Lekakeny Ole Sunkuli & 2 others* [2018] eKLR that a Replying Affidavit and written submissions being principal documents are fundamental pleadings in reply in a given matter. This goes to the heart of fair hearing with the elements that every person should be given an opportunity for a hearing was held in *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamed & 3 others* [2018] eKLR. an opportunity for hearing should be given and that opportunity must be reasonable and in this case, the court violated that right by failing to give the applicants a hearing and when these matters were brought to the attention of the court, this was not put into account and no priority was given to an application certified urgent.
- 16 The applicants also submitted that they brought to the attention of the court that there exists an appeal against the judgment dated 28<sup>th</sup> October, 2019 and the ruling dated 24<sup>th</sup> March, 2022 and the failure to



stay proceedings pending the hearing of such matters denied the applicants a fair hearing. Under Rule 5 of the Judicial code of conduct there should be recusal due to personal biases or prejudices concerning the applicants as held in *Kaplana Rawal v Judicial Service Commission & 2 others* [2016] eKLR. In response, the claimant submitted that the test for a Judge asked to recuse themselves is addressed in the case *Kaplana Rawal v Judicial Service Commission & 2 others* [2016] eKLR by asking the question whether there was a real danger that a fair trial was likely to be denied and whether there is reasonable apprehension of bias in the given circumstances that a fair minded and informed member of the public with proper application of mind to the case impartially would say that there is fairness. Article 50 of the *Constitution* on fair hearing read together with section 3 of the *Employment and Labour Relations Court Act* requires that each party be given a hearing and the court to facilitate the just expeditious and efficient resolution of disputes governed under the *Employment and Labour Relations Court Act*.

- 17 The court has upheld the principles of the Constitution and the law on various occasions when parties attended court and the applicants were allowed to take hearing dates at the registry but failed to do so and instead opted to seek for recusal of the Judge in this matter which should not be allowed as the same is only meant to derail the process of execution that the applicants have avoided since judgment herein issued on 28<sup>th</sup> October, 2019 and the orders sought should not be allowed and should be dismissed with costs.

### **Determination**

- 18 The subject application dated 26<sup>th</sup> April, 2022 is made on the basis that the court is biased against the respondents herein following its application dated 4<sup>th</sup> April, 2022 where the court declined to issue hearing date and hence openly and with intent to prejudice the respondents failed to allocate a hearing date.
- 19 First, there is no application dated 4<sup>th</sup> April, 2022 herein.
- 20 Secondly, noting the error in reference to such non-existent application, the respondents filed application dated 31<sup>st</sup> October, 2022 seeking to amend the Notice of Motion so as to reflect the correct position, no action has been taken to prosecute this application to date.
- 21 And thirdly, the matter came up to confirm filed submissions on 30<sup>th</sup> January, 2023 long after directions issued on 6<sup>th</sup> October, 2022 and no mention was made with regard to the need to amend the subject application dated 26<sup>th</sup> April, 2022.
- 22 On the substantive issues addressed by the respondents, the court will address on the merits.
- 23 Advocate for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed Notice of Appointment of Advocate on 9<sup>th</sup> March, 2022 by which time the claimant had filed application dated 21<sup>st</sup> January, 2022 and was pending hearing and had a mention date on 10<sup>th</sup> March, 2022 to confirm filed submissions. There are returns to confirm that all the respondents were served on 28<sup>th</sup> January, 2022. The purpose for the mention date on 10<sup>th</sup> March, 2022 was therefore clear. Service of Notices is not contested. From 28<sup>th</sup> January, 2022 the respondents opted to appoint advocates on 9<sup>th</sup> March, 2022 which is their right under the law save, the attendance herein on 10<sup>th</sup> March, 2022 was to confirm that the directions issued on 8<sup>th</sup> and 21<sup>st</sup> February, 2022 had been complied with.
- 24 On 10<sup>th</sup> March, 2022 the parties attended and advocate for the 1<sup>st</sup> respondent submitted that he was not aware of the mention date save there were no submissions as to how he had learnt of the mention date. Advocate for the 3, 4, and 6<sup>th</sup> respondents submitted that he was not aware when his clients had been served with notice to attend court.



- 25 The court issued directions that the purpose for the mention date was to confirm filed submissions with regard to application dated 21st January, 2022 and all parties should comply by close of business as service had been effected in good time and there were returns to confirm service and a ruling date was reserved for 24<sup>th</sup> March, 2022.
- 26 There was no activity in the interim.
- 27 The court delivered ruling on 24<sup>th</sup> March, 2022 as scheduled.
- 28 The respondents were directed to present books of account and to attend court for oral examination on 4<sup>th</sup> April, 2022. On the scheduled dates the respondent's advocate attended and requested for 21 days to present the books of account which was allowed save for 14 days and matter placed for hearing on 26<sup>th</sup> April, 2022 but instead the instant application seeking recusal of the Judge was filed. The respondents also filed application dated 10<sup>th</sup> April, 2022 seeking for stay of execution and the summoning of the respondents to attend court for examination and presentation of books of accounts.
- 29 On application dated 10<sup>th</sup> April, 2022 the Duty Judge certified the same urgent and to be addressed on 26<sup>th</sup> April, 2022. on 26<sup>th</sup> April, 2022 the court addressed the issue at hand, the attendance of the respondents for cross-examination and presentation of books of account which they had not addressed and were directed to attend on 5<sup>th</sup> May, 2022. On application dated 10<sup>th</sup> April, 2022 the respondents were directed to take a hearing date at the registry.
- 30 The respondents did not address as directed. They opted to file the instant application dated 26<sup>th</sup> April, 2022.
- 31 On 5<sup>th</sup> May, 2022 the respondents had not addressed as directed and they brought to the attention of the court both of their applications pending and dated 4<sup>th</sup> April, 2022 [10<sup>th</sup> April, 2022] and 26<sup>th</sup> April, 2022 and the court directed them to take hearing dates at the registry.
- 32 The chronology of events outlined above is imperative because, an application seeking the recusal of a Judge in a matter of alleged bias and prejudice against the parties should be given context as properly outlined by the claimant in his Replying Affidavit. The right to fair hearing is a constitutional right but with it comes responsibility. One cannot claim to enjoy the right to a fair hearing even where they do not seek to address basic minimums so as to secure such a right.
- 33 As outlined above, on 26<sup>th</sup> April and 5<sup>th</sup> May, 2022 the court considered two applications then filed by the respondents and issued directions, to take hearing dates at the registry. This was taking into account, underlying such applications there were ongoing matters with regard to the attendance of the same respondents to be cross- examined and to produce books of accounts.
- 34 The respondents did not take hearing dates at the registry.
- 35 The respondents did not attend court for cross-examination or produce books of accounts.
- 36 The demand was that the court should allocate them hearing dates in court. such function though available was already addressed and the respondents given a fair chance to secure hearing dates at the registry. This was not addressed until 5<sup>th</sup> July, 2022 when parties attended and were with a hearing date specifically for hearing of application dated 26<sup>th</sup> April, 2022 subject of this ruling.
- 37 In *Republic v Assa Kibagendi Nyakundi* [2022] eKLR the court while addressing the issue of recusal of a Judge on alleged bias held that;



- 38 The law on recusal of a Judge from a trial on the grounds of bias or likelihood of bias are well settled as shown on the submissions of the applicant and conceded to by the Respondent. The many authorities relied on by the parties confirm the position that for the existence or otherwise of bias, the test to be applied is that of a fair minded and informed observer who would adopt a balanced approach on the same.
- 39 And in *Olololo Game Ranch Ltd v National Land Commission & 2 others; Chief Land Registrar & 2 (Interested Parties)* [2020] eKLR the court while considering a similar matter held that;
- 40 A litigant who seeks disqualification of a Judge comes to court because of his own perception that there is 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 about the circumstance of the case.
- 41 Give the facts above and particularly orders and directions on 26<sup>th</sup> April, 2022 and further on 5<sup>th</sup> May, 2022 I have no doubt in my mind that the respondents herein were guided and their right to a fair hearing secured when they were directed to take hearing dates at the registry. Such directions are not based on bias or denial of a right to a fair hearing.
- 42 I find that the instant application does not meet the reasonable test and thus the facts do not establish the alleged bias nor establish the same. The supreme Court of Kenya in *Gladys Boss Sholei v JSC and Another* [2018] eKLR cited with approval in the case of *Simonson v General Motor Corporation* USDCP 425 RSupp574,578(1978) the court 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 case such as the one before us, we have concomitant obligation not to recuse ourselves; absent valid reasons for recusal their remains what has been termed as a “duty to sit”.

From the above it is clear that the requirements of independence and impartiality of judge must be counterbalanced by the judge’s duty to sit where no grounds of disqualification exists in fact or in law as the duty in itself helps to protect the independence of our courts against manouvering 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 v Commissioner of Inland Revenue*(2007)3NZLR 495.

- 43 Ultimately, the tempo is aptly summarised in the case of *Joseph Maina Theuri v Gitonga Kabugi & 3 others* [2013] eKLR where the court faced with a similar matter held that;

... The alter of justice is a platform of due process in which the presiding judge is a free voice of judging and chained only by the Constitution, the law and the established tenets of fairness and human dignity. The jurisdiction of the court to decide binds the presiding judge and the litigants and the court will frown at any unfounded tendencies by a litigant to shatter, snap, revolt, vacate or suppress the properly established jurisdiction of the court over the case at hand.

The court holds that the legitimate exercise of the free voice of judging in the case before the court does not constitute a legitimate ground for recusal of the presiding judge. That is the essence of the rule that judicial bias is no basis for recusal unless the judge’s bias is personal or based on some extra-judicial reason. Further, within that framework of exercising the legitimate free voice of judging, there is a general provision of application for



review or invoking appeal for a second chance for judging as may be necessary in appropriate circumstances. However, at all times of decision making the presiding judge must take all necessary care, and judges are reasonably presumed to be seasoned to take such care, that the best decision is made in the first instance of judging as per the circumstances and facts of the case so that recourse to review or appeal is therefore exercised by the parties as the exception in appropriate cases.

44 From the above and considering the fact of the application before me dated 26<sup>th</sup> April, 2022 I find that the allegation of bias is unsubstantiated and is tantamount to wanting to stop this court from the conduct of judicial function and I consequently dismiss the same with costs.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 27<sup>TH</sup> DAY OF MARCH, 2023.**

**M. MBARŪ JUDGE**

In the presence of:

Court Assistant: Japhet Muthaine

.....and ....

