



**Nderitu v Fincom Technologies Limited (Cause 2151 of 2017)  
[2023] KEELRC 709 (KLR) (20 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 709 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2151 OF 2017  
JK GAKERI, J  
MARCH 20, 2023**

**BETWEEN**

**ALEX PETER WAMBUGU NDERITU ..... CLAIMANT**

**AND**

**FINCOM TECHNOLOGIES LIMITED ..... RESPONDENT**

**RULING**

1. Before the court of determination is a Notice of Motion by the Claimant’s counsel dated 17<sup>th</sup> February, 2020 seeking orders that:-
  1. The Honourable Justice Dr. Jacob Gakeri do recuse himself from presiding over this matter.
  2. The matter be remitted to the Principal Judge, Employment and Labour Relations Court for assignment to a Judge other than Honourable Justice Dr. Jacob Gakeri.
  3. That costs of the application be provided for.
2. The application is expressed under Article 25 and 50 of the *Constitution* of Kenya, 2010 and Order 51 of Rule 1 of the *Civil Procedure Rules*, 2010 and all other enabling provisions of the law and is based on grounds set out on its face and the Supporting Affidavit sworn by counsel dated 17<sup>th</sup> February, 2023.
3. The affiant deposes that he has associated with the Honourable Justice Dr. Jacob Gakeri severally including being members of the Board of Management of a Secondary School among others which association and/or closeness may be occasion apprehension of prejudice.
4. Counsel deposes that it is in the interest of justice that the trial Judge recuses himself from conducting this matter.
5. On 7<sup>th</sup> February, 2023, Counsel for the Respondent raised the issue of recusal, at the instigation of counsel for the Claimant. Both parties were ready to proceed with the hearing.



6. The court directed the Claimant’s counsel to file a formal application for recusal together with a 2 page submissions within 7 days and counsel complied. A ruling date was fixed on 20<sup>th</sup> February, 2023 after counsel confirmed compliance with the directions issued on 7<sup>th</sup> February, 2023.

### **Applicant’s submissions**

7. Counsel identified one issue for determination, namely; whether the learned judge ought to recuse himself and reliance was made on the South African decision in the President of the Republic of South Africa V The South African Rugby Football Union & others to urge that the applicant had a reasonable ground to seek the recusal of the Judge.
8. It is submitted that the applicant has had several interactions with the judge at meetings as School Board of Management.
9. Reliance was also made on the findings of Deane J. in *Webb v The Queen* (1994) 181 CLR 41 on the four areas of conflict of interest, bias or prejudice which may lead to recusal or disqualification and in particular where association was concerned.
10. Counsel urged that a judicial officer could recuse him/herself on account of his/her association or closeness with a person(s) involved in the case as captured by Mogeni J. in *Thomas Nyangeri Mogaka v Roselyn Dola Ouko & another* (2021) eKLR.
11. Finally, counsel urged the court to find the application meritorious.

### **Determination**

12. The singular issue for determination is whether the Notice of Motion dated 17<sup>th</sup> February, 2023 is merited.
13. The applicant seeks recusal of the Judge from hearing and determination of the suit before the court on the ground of association and/or interactions counsel has had with the judge previously which in his considered view could occasion prejudice or biases.
14. The court is in agreement with counsel that there has been interactions and association in other forums and principally the membership of the Board of Management of a Secondary School where the applicant has been the Chairperson.
15. Based on the authority relied upon by counsel, the court is persuaded that association or interactions may give rise to oppression of bias.
16. According to Deane J. in *Webb v The Queen* (Supra);  

“Disqualification by association consists of cases where the apprehension of prejudgement or other bias result from some direct or indirect relationship experience or contact with a person or persons interested in or otherwise involved in the proceedings. . .”
17. The applicant/counsel urges the court to find that the apprehension of prejudice is reasonable by reason of various interactions between him and the Honourable Judge.



18. As regards reasonableness of the apprehension, the court is guided by the sentiments of Supreme Court of Canada in *R VS (RD)*(1977) 3 SCR 484 cited with approval by the Court of Appeal in *Hon. (Lady) Justice Kalpana H. Rawal v Judicial Service Commission & 2 others* (2016) eKLR as follows;

“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 two-fold objective elements; 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 . . . The jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence.”

19. The court is further guided by the sentiments of the court in *Kaplan & Stratton v Z Engineering Construction Ltd & 2 others* (2000) eKLR as follows;

“If disqualification issues were to be raised, say because a judge and a member of the Bar belong to the same Rotary club or the same lions club or the same sports club, there would be no end to such applications. When a member of the Bar is elevated to the Bench, his oath of office tells him enough to do what is right. Judges are human beings. They have their predilections and prejudices. They are a complex of instincts which make them man. For instance therefore, it is no ground to seek disqualification by saying that the judge does not like a particular member of the Bar.

The converse is also true.”

20. Finally, in *Hon. (Lady) Justice Kalpana H. Rawal v Judicial Service Commission (Supra)*, the Court of Appeal was emphatic that;

“*The constitution* guarantee a litigant trial by an independent and impartial court . . .”

21. It cannot be gainsaid that counsels appearing before the court reasonably believe that the court is independent and impartial and have the right to apply for recusal of the Judge or Magistrate if they have reasonable apprehension of prejudice or bias and the court must address the application or request for disqualification objectively.
22. Having been brought up and attended the same school, church and continued to interact in other for a thereafter, the court is satisfied that the association and interactions may occasion reasonable apprehension of prejudice, bias or partiality.
23. The court is persuaded that the applicant counsel has placed before the court reasonable grounds from which an inference of bias or partiality may be drawn.
24. In the end, the court is satisfied that the Notice of Motion dated 17<sup>th</sup> February, 2023 is merited and is accordingly granted in following terms;



- a. The Honourable Judge Dr. Jacob Gakeri do hereby recuse himself from presiding over this matter.
- b. The matter be referred to the Principal Judge, Employment and Labour Relations Court for re-allocation to a Judge other than the Honourable Justice Dr. Jacob Gakeri.
- c. There shall be no orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 20<sup>TH</sup> DAY OF MARCH 2023**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

