



Mbugua v National Cohesion and Integration Commission (Judicial Review Miscellaneous Application E003 of 2023) [2023] KEELRC 1875 (KLR) (27 July 2023) (Ruling)

Neutral citation: [2023] KEELRC 1875 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

JUDICIAL REVIEW MISCELLANEOUS APPLICATION E003 OF 2023

HS WASILWA, J

JULY 27, 2023

IN THE MATTER OF: AN APPLICATION BY THE APPLICANT, DR. SKITTER WANGECI MBUGUA FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY WAY OF ORDERS OF CERTIORARI AND MANDAMUS DIRECTED TO THE NATIONAL COHESION AND INTEGRATION COMMISSION

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA; THE EMPLOYMENT AET-2007; THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT, 2011; FAIR ADMINISTRATIVE ACTIONS ACT, 2015 AND THE LAW REFORM ACT (CAP 26)

BETWEEN

DR SKITTER WANGECI MBUGUA APPLICANT

AND

NATIONAL COHESION AND INTEGRATION COMMISSION . RESPONDENT

RULING

1. This Ruling is in respect of the Respondent's Application Chamber Summons dated 5th June, 2023, filed under certificate of urgency on 9th June, 2023, pursuant to Articles 2, 3, 10, 20, 25(1), 50(1), 165(4) and 259 of *the Constitution*, seeking for the following Orders:-
 1. Spent.
 2. The Honourable Justice Hellen Wasilwa be pleased to recuse and/or disqualify herself from any further conduct of this matter.
 3. There be an order of stay of proceedings including writing and/or delivery of any rulings or judgements in relation to the subject petition pending the hearing and determination of the application.



4. This matter be placed before any other court of competent jurisdiction, for its just and conclusive determination.
5. The costs of this application be in the determination.
2. The basis of this application is that, the conduct of the Learned Honourable Justice Wasilwa in the manner in which the proceedings herein have been conducted is indicative that the Learned Judge is overtly biased against the Respondent/Applicant herein and partial towards the Applicant.
3. He stated that the Applicant herein is justifiably apprehensive that it shall not be accorded justice if the Learned Judge continues to preside over this matter. He stated that the reasonable apprehension is evidenced by firstly, the fact that the Applicant/Respondent herein elected to file the present Judicial Review application in Nakuru, irrespective of the fact that the cause of action and the parties herein are domiciled in Nairobi, with a view to forum shop for a suitable Court to issue orders in her favour.
4. Secondly, that on 30th May 2023 when this matter came up for a mention to take a ruling date on the Contempt of Court Application dated 11th April 2023, the Learned Honourable Justice Wasilwa interpreted Order number 4 of the orders issued on the 20th of February 2023 to read that the stay orders issued extended to ALL disciplinary actions against the Applicant/Respondent including those outside the disciplinary action commenced vide letter dated 10th November 2022 under reference number NCIC/372. The vast orders prohibiting the Respondent/Applicant from all further proceedings were not prayed for by the Applicant/Respondent in her Application dated 19th February 2023 and therefore should not have been granted.
5. He stated that the application dated 19th February 2023 only sought to prohibit the Respondent/Applicant from proceeding with the disciplinary action commenced vide letter dated 10th November 2022 under reference number NCIC/372 but on 30th May 2023 when this matter came up for mention, the Learned Honourable Judge summarily pronounced that the Respondent/Applicant is in contempt of the orders issued on the 20th February 2023 without considering the Replying Affidavit and Submissions filed by the Respondent/Applicant thereto.
6. Following this hardliner position taken by the Honourable Learned Judge on the 30th May 2023, the Respondent/Applicant is reasonably apprehensive that the Learned Judge had already pre-determined the application for contempt without considering the Replying Affidavit and Submissions filed by the Applicant herein.
7. It is stated also that the Respondent herein is the legal wife of the Learned Honourable Justice Ocharo, a Judge of the Employment and Labour Relations Court station in Nairobi, who has been the Respondent's spokesperson in out-of-court discussions, and the Respondent/Applicant is therefore reasonably apprehensive that the Learned Honourable Justice Ocharo is exerting undue influence in the conduct of the matter including advising the Respondent herein to file the Judicial Review in the present Court which is outside the territorial location where the cause of action arose.
8. It is contended, however, that this Application is not a personal affront to Honourable Justice Wasilwa or Honourable Justice Ocharo but has been made in the best interest of justice. Thus, in the premise it is only fair and just that there be a stay of proceedings pending the interparties hearing and determination of the instant Application.
9. The Application is further supported by the affidavit of Rev. Dr Samuel Kobia, the Chairperson of the Applicant, who reiterated the grounds of the Application and added that the fundamental principle of justice is that justice must not only be done but must be seen to be done.



10. In response to the Application, Dr. Skitter Wangeci Mbugua, filed a replying affidavit, sworn on 13th June, 2023 and stated that the application herein is without merit and is intended to delay the expediate disposal of this matter.
11. She stated that indeed she is married to a Justice Ocharo Kebira of the Employment and Labour Relations Court and denied filling the JR in this Court for the sole purpose of obtaining a favourable decision.
12. It is her case, that when the issue relating to her employment arose in February, 2023, she approached her advocates on record who advised her against filling the suit in ELRC Nairobi, because her husband had been posted in the said station and her advocates advised her to either file the case herein in Nyeri or Nakuru which were on the close proximity to the parties. She added that its on fear that the other party would have perceived bias if the suit was filed in Nairobi, that informed the decision to file the suit out of Nairobi.
13. She stated that at the time of filling this JR Application, the Judge sitting in Nyeri was on leave and all matters were filed in Nairobi. For that reason, they were only left with Nakuru Employment Court which was close to the parties. Therefore, that the suit herein was filed in this Court for those reasons.
14. The affiant stated that she does not know any of the judges sitting in Nakuru at a personal level and that she is not an advocate. She also stated that the allegations that her Husband is exerting pressure on this court is without any basis and aimed that dragging her husband to the case and distract this court from dispensing justice.
15. She admitted that out of Court discussion were done sometimes in April, 2023 and the discussions were done through their advocates on record on without prejudice basis and not through her husband as alleged.
16. It is her case that she cited the 6 contemnors to the exclusion of the others commissioners because, they are the ones that were present and sat in the meeting of 4th April, 2023 that resolved to suspend her from office, which decision was in contempt of the orders issued by this Court on 20th February, 2023, which had stopped the Applicant herein and all its officers from undertaking further disciplinary proceedings against her.
17. Mr. Ezra Makori, advocates for the Respondent herein, working in the firm of Hamilton, Harrison and Mathews Advocates, filed an affidavit sworn on 13th June 2023 and stated with regard to allegation of forum shopping that he is the one that advised the Applicant/ Respondent herein against filling the suit in Employment Court at Nairobi .
18. He rubbished the allegations by the Respondent that Justice Ocharo Kebira was the one leading discussion for the out of court settlement and stated that all discussions were between him, acting for the Applicant and Mr. Mbugua acting for the Respondent and there are several letters confirming as much which cannot be produced before this Court because they were written on without prejudice basis. However, that they are available for inspection by the Judge in chambers if need arises.
19. Counsel stated that this application was only filed when this Court confirmed that the orders of 20th February, 2023 barred the Respondent from undertaking any further disciplinary action against the Applicant.
20. He also stated that from the narration given above, is clear that there is no relations between the Applicant and the Judge herein and the allegation of any interference has not been shown.



21. The Application was canvassed by written submissions with the Applicant filing on 10th July, 2023 and the Respondent on the 27th June, 2023.

Applicant's Submissions.

22. The Applicant submitted that its trite law that justice should not only be done but be seen to be done, therefore that litigants have expectation of being accorded fair hearing when they appear before a Court of law. He however submitted that as much as Article 50 of *the Constitution* guarantees the right to hearing, the law is not blind to instances of bias that may occur in Court as such the Supreme Court in the case of *Jasbir Singh Rai and 3 others V Tarlochan Singh Rai and 4 other* [2014] eKLR stated that:-

“From this definition, it is evident that the circumstances calling for recusal, for a Judge, are by no means cast in stone. Perception of fairness, of conviction, of moral authority to hear the matter, is the proper test of whether or not the non-participation of the judicial officer is called for. The object in view, in the recusal of a judicial officer, is that justice as between the parties be uncompromised; that the due process of law be realized, and be seen to have had its role; that the profile of the rule of law in the matter in question, be seen to have remained uncompromised.”

23. Also in *Kalpna H Rawal & 2 others v Judicial Service Commission & 2 others* [2016] eKLR, the Court relied on the case of *Bernert v Absa Bank Ltd* [2010] ZACC 28 where the Constitutional Court set down the applicable legal principles in a case that concerned the apprehension of bias thus:

“The apprehension of bias may arise either from the association or interest that the judicial officer has in one of the litigants before the court or from the interest that the judicial officer has in the outcome of the case. Or it may arise from the conduct or utterances by a judicial officer prior to or during proceedings. In all these situations, the judicial officer must ordinarily recuse himself or herself. The apprehension of bias principle reflects the fundamental principle of our Constitution that courts must be independent and impartial. And fundamental to our judicial system is that courts must not only be independent and impartial, but they must be seen to be independent and impartial.”

24. Accordingly that based on the facts of this case, the mind of fair-minded and informed observer could conclude that there is real possibility that the learned judge is overly biased towards the Respondent/Applicant herein and partial towards the Applicant/Respondent herein.
25. The Applicant submitted that the Employment and Labour Relations Court has unlimited jurisdiction all over Kenya, however that Section 15 of the *Civil Procedure Act*, instructs on places to file a case to the local limits where the parties reside and on the place where the cause of action arose. He argued that if indeed the Respondent's explanation is anything to go by, then she should have filed this suit at the nearest court such as Machakos Court to avert extra costs on the applicant is forced to incur. Therefore that its apparent that the Respondent herein filed the suit in this Court in order to forum shop for a court that is likely to issue favourable orders to her.
26. It was submitted that Order 4, issued on 20th February, 2023 had not been prayed for. That the court ordered that the leave to file a substantive JR Application operate as stay of any further disciplinary action against the Respondent herein, when the orders sought in the application was regard to a particular Notice to Show cause letter dated 10th November, 2022 under reference number NCIC/372. That despite raising the said concern, the court was adamant and affirmed that the Orders barred



any further disciplinary proceedings against the Respondent herein, ascertaining further that the Court was compromised.

27. The Applicant also submitted that the presence of Justice Ocharo in the out of Court discussion, and being the Husband of the Respondent herein and a Judge of Employment Court, raises more concern for the Applicant who are apprehensive that the said Justice Ocharo is asserting pressure on this Court to make a decision that is favourable to the Respondent as such the Court might not be impartial in its decision making with regard to this suit.
28. Based on the foregoing, the Applicant urged this Court to recuse herself and transfer this case for hearing and determination before any other court of competent jurisdiction.

Respondent's Submissions.

29. The Respondent submitted that the Application for recusal herein is based on allegation of apprehension of bias by this Court, which allegations have no basis and does not meet the threshold that would require this court to recuse itself.
30. It was submitted that Black's law dictionary 6th Edition defines recusal as the process by which a judge is disqualified on the objection of either party from hearing a lawsuit because of self-interest, bias or prejudice. He argued that the consideration that is taken by the Court is whether there is reasonable apprehension of Bias. In this they relied on the case of *Kalpna H Rawal V Judicial Service Commission & 2 others* [2016] eKLR where the Court cited the case Of *Magill v. Porter* (2002) 2 AC 357, in which the House of Lords subsequently modified the test to whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased.
31. They also relied on the case of *Attorney General of Kenya V Prof. Anyang Nyong'o & 10 others* EACJ Application No. 5 of 2007 where it was held 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 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.”
32. It was submitted that an application for recusal should be accompanied by cogent evidence that it would appear in the mind of a fair minded and informed observer that there is real possibility that the judge is bias.
33. With regard to filling this suit in this Court as opposed to Nairobi ELRC, it was submitted that the reasons that informed that decision have been elaborated in the replying affidavit of both Respondent and her advocate on record.
34. On allegation that fresh orders were made by this Court on 30th May, 2023, it was submitted that the Court clarified verbally her orders of 20th February, 2023 and directed parties to file their submission for the contempt application that was slated for Ruling on 20th June, 2023. He added that the ruling on the contempt application has not been delivered, and nothing has been placed before this Court to suggest that the court will be compromised in the final determination of this case. On the other hand



that the Application herein has been used by the Applicant as a decoy to delay the determination of the contempt Application which had been slated for Ruling on 20th June, 2023.

35. It was argued that without any evidence of bias being tabled before this Court, the trial court has a duty in law to sit as was stated in the supreme Court case of *Gladys Boss Shollei V Judicial Service Commission & Another* [2018] eKLR where the Court held that:-

“Tied to the constitutional argument above, is the doctrine of the duty of a judge to sit. Though not profound in our jurisdiction, every judge has a duty to sit, in a matter which he duly should sit. So that recusal should not be used to cripple a judge from sitting to hear a matter. This duty to sit is buttressed by the fact that every judge takes an oath of office: “to serve impartially; and to protect, administer and defend *the Constitution*.” It is a doctrine that recognizes that having taken the oath of office, a judge is capable of rising above any prejudices, save for those rare cases when he has to recuse himself. The doctrine also safeguards the parties’ right to have their cases heard and determined before a court of law.”

36. In conclusion, it was submitted that no evidence of the alleged bias has been tabled before this Court and considering that evidence has to be produced in prosecuting such application, the application herein is not merited and urged this Court to dismiss it with costs.
37. I have examined all averments and submissions of the parties herein. As submitted by the applicants herein they perceive bias in this court because the court determined the issue of contempt vide court’s orders of 30/5/23.
38. The applicants aver that they are justifiably apprehensive that they will not be accorded justice by this court because this matter was filed in Nakuru and not Nairobi where the cause of action arose.
39. In determining this application let me revisit the issues that the applicants have raised as showing bias:-

1. Issuing orders not sought for.

40. This is in relation to this court’s orders of 20/2/2023. On 20/2/23 the applicants filed an ex parte application before me seeking orders to certify the application urgent and also to be allowed to file a JR application for an order of certiorari to bring to this court and quash the decision of the respondent to commence disciplinary proceedings contained in the letter ref. no. NCIC/372 dated 10th November, 2022 purporting to invite the ex parte applicant to show cause why disciplinary action should not be taken against her and any subsequent letters/decisions arising thereafter.
41. They also sought an order that the leave so granted to operate as stay from any disciplinary proceedings commenced by the letter of ref. No. NCIC/372 dated 10th November, 2022.
42. By the order of the court I granted orders so sought allowing commencement of a JR application and further an order allowing the order of leave to operate as stay of further disciplinary proceedings against the applicant pending further directions of the court and hearing and determination of the JR application.
43. The parties appeared before me inter partes after the filing of the JR application.
44. On 21/3/23, this court was informed that the respondents had filed a preliminary objection in the matter. The preliminary objection is yet to be disposed of.



45. On 13/4/23, when the parties appeared in court, the petitioner respondent intimated to court that there were new developments in court necessitating filing another application of 12/4/23. The application filed was a contempt application.
46. The respondents in court through their counsel intimated that they had not disobeyed any court orders. I reiterated the orders of 20/2/2023.
47. The contempt of court application is still pending before court awaiting a ruling which I shelved in order to give room for the hearing of the recusal application.
48. From the chronology of events herein, there is no order this court granted that was not sought for and this court's jurisdiction is not fettered not to grant orders that meet the ends of justice.

2. The issue of filing this application in Nakuru as opposed to Nairobi where the cause of action arose.

49. The applicants have averred that the petition was specifically filed in Nakuru by the petitioner due to undue influence that was being exerted towards this court by J. Ocharo – a judge of ELRC who is a husband to the petitioner.
50. I have now confirmed from the affidavit filed by the petitioner that she is indeed a spouse of my colleague J. Ocharo stationed at the ELRC Nairobi.
51. That said and done J. Ocharo is a colleague to all Judges of the ELRC the court within whose jurisdiction falls.
52. In the affidavit filed by the petitioner and her counsel, the reasons informing the filing of this petition in Nakuru ELRC have been explained.
53. The only contention is that J. Ocharo is my colleague and indeed he is a colleague of all ELRC Judges.
54. There is no evidence that J. Ocharo has exerted pressure upon this court to determine the petition/application in favour of his wife.
55. Counsel for the petitioner explained why he advised his client to file the application in Nakuru and not Nairobi.
56. This was done without courts involvement. The only issue the applicants are holding on is that there is an apprehension that this court would not grant justice to them because Ocharo J. is my colleague.
57. My question then is where should a Judge or his or her spouse file case in Kenya given that all Judges are colleagues? Are Judges or their family members precluded from filing suit?
58. That notwithstanding, this is a court – status of a High Court. The High Court has a geographical jurisdiction in the entire republic of Kenya as provided for under Article 162 (2) (a) of *the Constitution* and Section 12 of the *ELRC Act*. There is nothing that would bar this court from hearing a claim of this nature even if the cause of action occurred in Nairobi.
59. Having established factual issues, let me now revert to the legal principles in relation to recusal.
60. The law on recusal has been laid out in *AG VS Prof Anyang Nyong'o & 10 others* EACJ Application No. 5 of 2007 where the court stated that;

“the objective test of reasonable apprehension of bias is good law... do the circumstance give rise to a reasonable apprehension in the view of a reasonable, fair minded and informed



members of the public that the Judge did not (will not) apply his mind to the case impartially.....”

61. In *Jasboi Singh Rai & 3 others VS Tarlocham Singh Rai & 4 others* (2013) eKLR the court reiterated the principal of a reasonable man and restated that perception of fairness, of conviction of mental authority to hear the matter is the proper test.
62. This has been the rallying call in matters recusal and *Philip K. Tunoi & another VS the JSC & another* (2016) eKLR the Court of Appeal opined as follows:-

“The House of Lords held in *R v. Gough* [1993] AC 646 that the test to be applied in all cases of apparent bias was the same, whether being applied by the Judge during the trial or by the Court of Appeal when considering the matter on appeal, namely whether in all the circumstances of the case, there appeared to be a real danger of bias, concerning the member of the tribunal in question so that justice required that the decision should not stand. The test in *R v. Gough* was subsequently adjusted by the House of Lords in *Porter v. Magill* [2002] 1 All ER 465 when the House of Lords opined that the words “a real danger” in the test served no useful purpose and accordingly held that –

“[T]he question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”

In determining the existence or otherwise of bias, the test to be applied is that of a fair-minded and informed observer who will adopt a balanced approach and will neither be complacent nor be unduly sensitive or suspicious in determining whether or not there is a real possibility of bias.

63. In *Tuff Bitumen Ltd VS SBM Bank (K) Ltd and another* (Civil Suit No. E018 of 2023) KEHC 3198 (KLR) (Commercial & Tax) (14 April 2023) the court expressed itself as follows;

“The bedrock of this determination rests on the test that a recusal is necessitated where it is proved beyond peradventure, speculation, conjecture, and sheer paranoia, that a judicial officer will not impartially handle a case before him, as a result of actual bias or a reasonable apprehension thereof; and never on unfounded or unreasonable apprehension. ... I dare say that this application is among its other intentions, a forum shopping scheme that should not find glorification of whatsoever... Some recusal applications such as this particular one, are made in the hope that they will tarnish the Judge's reputation as well as cause him or her psychological, mental and emotional pain regardless of whether the application succeeds or not. This should be resisted by every Judge minded about his judicial oath of office, which is that he will dispense justice without fear, favour or other influence, and with fidelity to the law and *the Constitution*. Judicial office is not for the fainthearted and a Judicial officer's spine ought to be made of steel... The extravagantly devious and mischievous dispatch of judicial recusal will be the death bed of the authority and dignity of judiciaries. Especially where recusal applications and threatened or complaints to the Judicial Service Commission (JSC) are used by litigants and their advocates as the sword of Damocles hanging on the necks of judicial officers. By so doing, recusal then becomes an occupational hazard for judicial officers, which was never its intended purpose. Judges who have in the course of proceedings not perpetrated any impropriety, should gladly appear before the JSC and vindicate themselves of such complaints. This will stem the current state of affairs, where



uncanny litigants keep waving to the Judges, the stick of a complaint to the JSC. Unless hard tackled, recusal application can at times be exploited for hidden litigation gains such as stealing the match from the court, unevening the playing field to the disadvantage of their adversaries, upstaging them, or removing them from the seat of justice.”

64. The principle of the law as espoused above is that application for recusal should be determined based on proper facts and should be necessitated where it is proved beyond peradventure, speculation, conjecture and sheer paranora that a judicial officer will not be impartial.
65. This should be discouraged where the application is based merely on unfounded apprehension of an unseen or unknown reason.
66. In the instant application, the applicants have sought this court recusal because of mere apprehension of bias which apprehension is not backed up with any reasonable facts.
67. This court is a court of justice. It is also a court of law. Having taken my oath to do justice without fear, favour, ill will or de affection this court stands by its oath and cannot down its tools due to unreasonable apprehension of a litigant bent on delaying justice for their own whims.
68. I will dispense justice for all and find no reason warranting my recusal from hearing this matter.
69. I find the application for recusal is not warranted and the same is declined and dismissed accordingly with costs.

RULING DELIVERED VIRTUALLY THIS 27TH DAY OF JULY, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

