Republic v Egerton University & 2 others; Kibue & 2 others (Exparte Applicants); University Academic Staff Union (Interested Party) (Judicial Review Miscellaneous Application E001 of 2023) [2023] KEELRC 1707 (KLR) (5 July 2023) (Ruling)

Neutral citation: [2023] KEELRC 1707 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

JUDICIAL REVIEW MISCELLANEOUS APPLICATION E001 OF 2023

HS WASILWA, J

JULY 5, 2023

INT THE MATTER OF ARTICLE 22(1) AND 23(1),(3) ON THE ENFORCEMENT OF BILL OF RIGHTS BY THE COURT AND THE AVAILABLE RELIEFS INCLUDING AN ORDER OF JUDICIAL REVIEW

IN THE MATTER OF SECTIONS 7 (1) (2) (E, F, H, K, M, N, O) AND 8 OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF PROHIBITION UNDER SECTION 7 AND 8 OF THE LAW ACT AND ORDER 53 OF THE CIVIL PROCEDURES RULES, 2010

BETWEEN

REPUBLIC ..... APPLICANT

AND

EGERTON UNIVERSITY ..... 1ST RESPONDENT

THE COUNCIL, EGERTON UNIVERSITY ..... 2ND RESPONDENT

THE VICE-CHANCELLOR, EGERTON UNIVERSITY ..... 3RD RESPONDENT

AND

DR GRACE WANJIRU KIBUE ..... EXPARTE APPLICANT

PROF SILAS MWANIKI NGARI ..... EXPARTE APPLICANT

UNIVERSITIES ACADEMIC UNION STAFF UNION, EGERTON UNIVERSITY CHAPTER ..... EXPARTE APPLICANT

AND

UNIVERSITY ACADEMIC STAFF UNION ..... INTERESTED PARTY

RULING

1. This ruling is in respect of the ex parte Applicants Notice of motion dated 9th March, 2023, filed pursuant to Article 51 of *the Constitution* of Kenya, 2010 and Order 51 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law, seeking for the following Orders; -

    a) ThatHonorable Lady Justice Hellen Wasilwa be pleased to disqualify or recuse herself from hearing and determining this matter and that the matter be placed before any other court for directions and/or hearing and determination of this matter.

    b) Thatthe costs of this application be in the cause.

2. The Application is based on the grounds on the face of the Application and the affidavit of Dr. Grace Wanjiru Kibue, the 1st Ex parte Applicant herein, deposed upon on the 9th March, 2023. These grounds are as follows; -

    i. It is stated that, the cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before the courts and other tribunals. That, the Ex-Parte Applicants have a constitutional guarantee of a fair and impartial hearing.

    ii. It is contended that the ex-Parte Applicants are greatly aggrieved and condemned by the bias and detrimental conduct of the learned judge in several matters relating to the parties herein and serialized as; Nakuru ELRC Constitutional Petition No. 23 of 2021 - Universities Academic Staff Union and Universities Academic Staff Union, Egerton University Chapter vs. Egerton University Council & another, Nakuru ELRC Petition No, E012 of 2022 Egerton University —vs- Universities Academic Staff Union & another and Nakuru ELRC CAUSE E008 of 2023 Egerton University —vs- Universities Academic Staff Union and Universities Academic Staff Union, Egerton Chapter.

    iii. In all the above stated cases, the ex parte applicant stated that despite lodging water tight cases against the Respondents, the Honorable Judge has not been impartial and has always issued orders and or rulings in favour of the Respondents, which action has greatly prejudiced the constitutional rights of the Exparte Applicants.

    iv. Due to the foregoing, the ex parte Applicant made an executive committee decision to lodge a complaint, which they did by the letter of 9th February, 2023 over matters relation to the Universities Academic Staff Union, Egerton Chapter which was received and serialized as JSC Petition No. 6 of 2023.

    v. It is stated that the actions by the Honorable Judge violates the cardinal guarantees of *the Constitution*, such as the right to fair trial upon which the entire judicial edifice is built.

    vi. The Ex parte applicant stated that they are apprehensive that the Honorable Judge will have a pre-determined disposition of this mentioned matter taking into account her previous decisions in the above listed matters.

    vii. She stated that the ex parte Applicants reasonably apprehends that the Learned Judge's objectivity, open mindedness, fairness and impartiality to hear and determine the present suit has been compromised by the obvious biasness and frustrations prevalent in the previous proceedings involving similar parties and based on similar grounds.

viii. That the perception of justice is paramount as it is the same that makes decisions palatable, and it is the responsibility of this honorable court to manage this perception. Further that justice must not only be done, but must also be seen to have been done. Additionally, that they are apprehensive that the court has lost objectivity and open mindedness as well as the requisite impartiality to fairly and justly hear and determine this dispute.

ix. Consequently, that they have lost all confidence in the learned judge's ability to fairly and expediently adjudicate over this matter and is of the opinion that it is now not possible for the court to fairly and impartially determine this matter without being influenced by its earlier decisions.

3. The Application is opposed by the Respondents who filed a replying affidavit deposed upon by Prof. Isaac Kibwage, the Vice Chancellor of the 3rd Respondents, deposed upon on 17th April, 2023 and based on the following grounds; -

a) That on 11th October 2022, the Secretary General of the Interested Party issued a strike notice to the Chairman of the 2nd Respondent informing him that the Interested Party was to commence industrial action by withdrawing labour effective 18th October 2022.

b) The said notice indicated that the launch of the strike would take place on 17th October 2022, which was a working day and which was before the expiry of the 7 days and contrary to the dictates of section 57 of the *Interpretation and General Provisions Act*, which intimates that when computing time a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done, which means that the 7 days were to lapse on 18th October 2022, and the strike would then legally commence on 19th October 2022.

c) It is stated that on 17th October 2022, before the expiry of the strike notice, the ex parte applicants and the Interested Party launched the intended strike and the 1st and 2nd ex parte applicants participated in the illegal strike by causing members of the 3rd ex parte applicant to assemble at the Graduation Square adjacent to Kilimo Hall and mobilized students to participate in the union activities.

d) At 1.30 p.m. the Respondents received information from its Chief security officers that the 1st and 2nd ex parte applicants, members of the 3rd applicants and members of Kenya Universities Staff Union attempted to disrupt the 2nd Africa-UniNet Assembly whilst the Australian Ambassador to Kenya was addressing the conference.

e) Faced with the eminent strike, the Respondent instructed its advocates to seek legal remedy and stop the illegal strike. Their Advocates filed a case on 18th October, 2022 serialized as Nakuru Petition No. 12 of 2022 Egerton University versus Universities Academic Staff and Universities Academic Staff, Egerton Chapter. Where this Court delivered its orders in the following terms;In balancing this right to go on strike and the explanation given by the Petitioner, I am of the considered view the Petitioner cannot hold back strike action forever. The Petitioner must be willing to cede ground and meet the union and demonstrate that they are working towards resolving the issues explained herein. Further demonstrate when they are willing to pay dues complained of or withheld by showing that the money has been factored in the budget cycle and is expected to be released in the near future.The other alternative for the Petitioner will be to initiate a redundancy process if they cannot meet their financial obligations. In the circumstances, I find that the Application filed by the Petitioner seeking a raft of orders cannot

stand. I will exercise discretion and direct that the Petitioner should within 120 days being the end and beginning of the budget cycle demonstrate how they are implementing what is in the CBA between them and the Union and in default the Respondent union is free to initiate a fresh strike action after giving the requisite notices as the case may be.

f) It is stated that from the decision of the Court, there is not iota of bias exhibited therein as alleged by the ex parte applicants. Infact that Lady Justice Wasilwa has made many rulings and judgments in favour of the 3rd ex parte applicant and as such the application herein has been made with great mischief and is meant to delay the quick finalization of the proceedings herein

g) He stated that with regard to Nakuru ELRC No E008 of 2022 Egerton University versus Universities Academic Stay, the 3rd ex parte applicant applied that the matter be heard together with Nakuru ELRC No. 16 of 2022 Universities Academic Staff and Universities Academic Staff Egerton Chapter versus Egerton University, the Council Egerton University and Vice Chancellor Egerton University but when the matter was placed before Justice Nderitu, he declined to hear the matter since proceedings in Nakuru ELRC No. 16 of 2022 Universities Academic Staff and Universities Academic Stay Egerton Chapter versus Egerton University, the Council Egerton Universities and Vice Chancellor Egerton University, had been stayed by the Court of Appeal. He referred the matter back to Justice Wasilwa and the matter is pending Ruling which was delivered on 23rd May 2023.

h) It is stated that the ex parte applicants never raised the issue of bias in that case, therefore what can be deduced from their conduct is that they were forum shopping to have the matter heard by a judicial officer who is perceived to be more sympathetic to them.

i) With regard to Elrc case number No. 23 of 2021 Universities Academic Staff and Universities Academic Staff, Egerton Chapter versus Egerton University, the Council Egerton University and Vice Chancellor Egerton University, this court delivered a judgment on 24th May 2022 and the 3rd ex parte applicant has filed an appeal against the said decision and having an appeal they cannot be heard to complain about the court being biased.

j) He stated that the test whether a judicial officer should recuse herself or himself is that it must be proved beyond peradventure, speculation, conjecture or sheer paranoia that the officer will not impartially handle the case before him or her as a result of actual bias or reasonable apprehension of bias, which the Ex parte applicant have failed to demonstrate.

k) He contends that the application herein for recusal and the complaint against the judge to the Judicial Service Commission are made in the hope that they will tarnish the judge's reputation and cause her psychological, mental and emotional pain, and intimidate her irrespective of whether the application succeeds or not.

l) The Respondent believes that the applicants have not met the threshold for the Honourable judge to recuse herself and she should respectfully decline the invite by the applicants.

4. The Application was canvassed by written submissions.

Applicant's Submissions.

5. The Applicant submitted on two issues; whether the application is merited and who should bear costs of the Application.

6. It was submitted with regard to the first issue that rules of natural justice and fair hearing as provided for under Article 50 of *the Constitution* must be upheld by every judge. It was argued that the rules

of natural justice dictates that all proceedings must be conducted in a fair manner and every decision must be based on evidence and the Court should not allow itself to be influenced by personal biases as was stated in Charity Muthoni Gitabi V Joseph Gichangi Gitabi [2017] eklr and the case of Kalpana Rawal V Judicial Service Commission and 2 others [2016] where the Court held that;-

> " 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. When reasonable basis for requesting a judge to recuse himself or herself exists, the application has to be made, unpleasant as it may be. That is the lesser of two evils. The alternative is to risk violating a cardinal guarantee of *the Constitution*, namely the right to fair trial, upon which the entire judicial edifice is built. Allowing a judge who is reasonably suspected of bias to sit in a matter would be in violation of the constitutional guarantee of a trial by an independent and impartial court."

7. It was argued that the basis upon which they believe Judge was biased was on three occasions in the case of Nakuru ELRC Constitutional Petition No. 23 of 2021 - Universities Academic Staff Union and Universities Academic Staff Union, Egerton University Chapter v Egerton University Council & another, Nakuru ELRC Petition No, E012 of 2022 Egerton University v Universities Academic Staff Union & another and Nakuru ELRC CAUSE E008 of 2023 Egerton University —vs- Universities Academic Staff Union and Universities Academic Staff Union, Egerton Chapter.

8. It was argued that the Honourable Judge was biased in the three stated cases and they are apprehensive that she will not be impartially with their other matters which are pending for determination before the Court. He added that they are apprehensive that the decision rendered in the above cited cases will influence the decision to be rendered in their other cases. In this they relied on the case of Attorney General of Kenya v Prof. Anyang Nyongo & 10 others EACJ Application no. 5 of 2007 where it was stated 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 view of a 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 would be."

9. Similarly, that since a certain trajectory has been set by the Court, which they consider it to be biased, their other cases might not be determined impartially. He added that complaints have been raised by the 3rd Ex parte Applicant in three matter which the Judge is handling, therefore that even if the subsequent matters are handled fairly, the Union might not see the fairness of the decision, when its trite that justice

must must not only be done but it must be seen to be done as stated in the case of Jasbir Singh Rai & 3 others v Tarlocham Singh Rai & 4 other [2013] eklr where the Court stated that;-

> " Recusal, as a general principle, has been much practiced in the history of the East African judiciaries, even though its ethical dimensions have not always been taken into account. The term is thus defined in Black's Law Dictionary, 8th ed. (2004)
>
> "Removal of oneself as judge or policy maker in a particular matter, [especially] because of a conflict of interest."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.It is an insightful perception in the common law tradition, that the justice of a case does not always rest on the straight lines cut by statutory prescriptions, and the judicial discretion in its delicate profile, is critical to equitable outcomes. This is what Sir David Maxwell Fyfe meant when he attributed to Lord Atkin a "constructive intuition which operates after learning and analysis are exhausted" [in G. Lewis, Lord Atkin (London: Butterworths, 1983), p. 166]. It is precisely such delicate elements of judicial fairness that will also feature in the judgment as to whether or not the recusal of a Judge, particularly in the case of a collegiate Bench, is of any materiality, in a given case."

10. It was submitted that section 7 of the Judicial Service Code of conduct provides for how a Judge can exercise judicial authority. Further that the Bangalore principles emphasizes further on the need by Judge to exercise independence in carrying out their duties. Be impartial and perform their duties without favour, bias and prejudice. Based on the foregoing, the Ex parte Applicant urged this Court to recuse itself from acting in any of the matter touching on the Ex parte Applicants.

11. On costs, the Applicant submitted that costs follow event as provided for under section 27 of the *Civil Procedure Act* and prayed to be awarded costs of this Application.

Respondents Submissions.

12. The Respondent submitted on only one issue; whether the Honourable Justice Hellen Wasilwa should disqualify or recuse herself from hearing and determining this matter and this file be placed before any other court for hearing and determination of this matter.

13. It was submitted that Regulation 9 of the Judicial Service (Code of Conduct and Ethics) Regulations 2020 provides for principle that must be observed by a judge in carrying out their duties, while Regulation 21 of the Judicial Service (Code of Conduct and Ethics) Regulations 2020 provides for instances where a Judge can recuse themselves. They cited the case of Republic v David Makali & 3 others [1994] eKLR where the Court of Appeal laid down the test to be applied in determining an application for disqualification of a Judge from presiding over a suit as follows:-

> " It is common knowledge that applications to disqualify judges from trials are indeed very rare and have been made only in exceptional circumstances and usually they have been treated carefully with the seriousness they deserve. The normal practice is that a judge who discerns or perceives an allegation of bias being raised against him readily disqualifies himself from sitting. This is normally done informally. Again, if the circumstances warranting his

disqualification become known to him upon the opening or later in the course of the hearing he would disqualify himself at this point. How should judges treat the subject of disqualification when raised before them?

14. They also relied on the case of Raybos Australian Property Ltd & Another v Tectran Corporation Property Ltd (supra) It was held that:-

> " Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."

15. In the case of Nyamodi Ochieng – Nyamogo & Another v Kenya Posts & Telecommunications Corporation Civil Application No Nai 264 of 1993:

> " In the end we agree with Mr Lakha that all Dr Khaminwa attempted to put before us was that the applicants would have preferred that their application should be heard by the same bench which made the orders they are not alleging to have been breached by the Corporation and its officers. For our part, we dare say that most litigants would much prefer that they be allowed to shop around for the judges that would hear their cases. That, however, is a luxury which is not yet available under our law to litigants and these applicants cannot have it. The preliminary point taken by Dr Khaminwa on behalf of the applicants accordingly fails."

16. Further in Philip K. Tunoi & another v Judicial Service Commission & 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.

17. Accordingly, that the main complaint by the ex-parte applicants is that the Honourable judge is impartial and is biased, which is far from the truth because, it has been demonstrated by the Respondents that the Honourable judge has made rulings which are against them as she has also made rulings which are against the ex-parte applicants. As was seen in Nakuru ELRC Petition No. 12 of 2022 Egerton University versus Universities Academic Staff and Universities Academic Staff, Egerton Chapter.

18. It was submitted that the instant application has been made with the sole aim of tarnishing the Judge's reputation and cause her psychological, mental and emotional pain, and intimidate her. In this, the Respondent cited the case of Tuff Bitumen Limited v SBM Bank (Kenya) Limited & another (Civil Suit E018 of 2023) [2023] KEHC 3198 (KLR) (Commercial and Tax) (14 April 2023) (Ruling) 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."

19. The Respondent urged this Court to adopt the above reasoning and respectfully and politely decline the invitation for recusal. Further that the ex parte Applicants have not met the threshold required for a judge to disqualify herself and prayed for the Application to be dismissed with costs being in cause.

20. I have examined the averments and submissions of the parties herein. As exemplified in the above facts, the application before me stems from the perceived or otherwise view of the applicants herein that this court is biased against them citing three different causes where this court has rendered rulings/ judgments perceived to be against them.

21. The applicants cited three matters handled by this court being Nakuru ELRC Pet. No. 23/2021, ELRC Pet. No. 12/2022 and Nakuru ELRC No. 8/2023 all concerning the applicant and respondents herein.

22. The applicants aver that due to their perceived bias, they even decided to file a petition before the JSC against the Hon. Court being JSC Pet. No. 6 of 2023.

23. They have averred that due to the decision made by this court, they are apprehensive that this court will have a pre-determined disposition in this matter taking into consideration this court's previous decisions.

24. The respondents on their part opposed this application and in their reply indicated that in the cited three matters this court infact gave balanced judgments and rulings and even in favour of the applicants.

25. In the first Petition No. 12 of 2022, this court delivered its judgment and even gave orders allowing the petition giving time lines for implementation.

26. In cause No. 023/2021 this court gave orders which orders the applicants herein have filed an appeal against. The appeal is pending before the court of Appeal.

27. Petition E08/2022 was initially before Hon. Justice Nderitu and he declined to hear the matter since proceedings in a related matter had been stayed by the Court of Appeal. The claim was brought before this court which proceeded to hear it rendering a ruling on 23rd May, 2023 in favour of the respondents.

28. In determining this application, I set out 2 issues that require my determination;

    1. Whether this application meets the legal threshold for recusal.

    2. Whether I should allow the application.

29. In determining whether the legal standard for recusal has been achieved, I would consider whether the reasons for recusal are based on mere apprehension of bias or actual bias.

30. As held in Tuff Bitumen Ltd v SBM Bank (Kenya) Ltd & Another Supra

> " where an application is based on apprehension rather than actual bias, the apprehension should be that of a reasonable person and must be addressed in the light of the true facts as they emerge at the hearing of the application and the rest to weigh the apprehension should be an objective one and not subjective based for instance on paranoia".

31. The Court of Appeal in Uhuru Highway Development Ltd v Central Bank of Kenya & 2 others CA No. 36 of 1996 stated as follows;

> " Except where a person acting in a judicial capacity had a pecuniary interest in the outcome of the proceedings, when the Court would assume bias and automatically disqualify him from adjudication, the test applied in all cases of apparent bias was whether having regard to the relevant member of the tribunal in question, in the sense that he might unfairly regard or unfairly regarded with favour or disfavor the case of a party to issue under consideration by him: the real test is in terms of real danger rather than real likelihood to ensure that the Court is thinking in terms of possibility rather than probability of bias..... Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duties to sit and do not, by acceding too readily to the suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a Judge, they will have their cases tried by someone thought to be more likely to decide the case in their favour.... Although most litigants would much prefer that they be allowed to shop around for Judges that would hear their cases, that is a luxury which is not yet available under our law to litigants".

The objective test as set out above and also by the court of appeal in Philip Tunoi and Another v JSC & Another 2016 Eklr

> " the 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".

32. In this regard the test to be applied is that of a reasonable man and reasonable observer who when considering the fact and circumstances in existence would reach a determination indicating whether or not there is a real possibility of bias.

33. In applying the above test, the complaint by the applicants is that this court is biased against them considering 3 other matters this court has heard and rendered a determination upon.

34. Let me restate these 3 matters and the decisions reached by this court.

35. In Pet. No. 23/2021 the issue concerned interpretation of the parties CBA. I found in favour of the petitioner partly by determining that the respondents action of lifting waiver on tuition fees on staff with effect from July, 2021 was in contravention of the parties CBA and therefore illegal null and void. On the workplace policy, this court determined that it is determinable by an employer. The respondents prayers had no correlation with the CBA. The parties appealed my decision which is still pending before the Court of Appeal.

36. In Petition 08/2022, this court made a ruling on the same on 23/5/23 and found in favour of the respondents as follows;

> " having found as above, I find for the claimant applicants as prayed and declare the industrial action issued by the 2nd respondents vide a letter dated 13th January, 2023 set to commence on 6th February, 2023 was unprotected and unlawful illegal null and void and I declare it so".

37. I granted orders restraining the respondents and/or their agents or servants howsoever from proceeding with the industrial action as issued by the 2nd respondent dated 13th January 2023 pending the hearing and determination of this cause or until further orders of this court.

38. The main petition has not been disposed off. Petition 12/2022 related to non-remittance of 3rd parties deductions, to bank, SACCOs, Insurance companies etc. by the petitioners herein.

39. In resolving this matter vide my ruling of 16th March, 2023, I gave orders dismissing the petitioners (respondents herein) case as follows;

1. "The Petitioner must be willing to cede ground and meet the union and demonstrate they are working towards resolving the issues explained herein.

2. The Petitioner should actually demonstrate when they are willing to pay dues complained or withheld by showing that the money have been factored in the budged cycle and is expected to be released in the near future.

3. The other alternative for the Petitioner will be to initiate a redundancy process if they cannot meet their financial obligations.

4. In the circumstances, I find that the application filed by the Petitioner seeking a raft of orders cannot stand. I will exercise my discretion and direct that the Petitioner should within 120 days being the end and beginning of the budget cycle demonstrate how they are implementing what is in the CBA between them and the Union and in default the Respondent union is free to initiate a fresh strike action after giving the requisite notices as the case may be.

5. Costs in the cause".

40. As demonstrated above, the contention by the applicants that I have all along been biased against them is not true. This court has actually delivered Judgments and Rulings in their favour in the mentioned causes.

41. Their claim of bias is actually based on apprehensive rather than actual bias. The bedrock of recusal can only be where it is proved beyond doubt or speculation, innuendos and paranoia that a judge or judicial officer will not be impartial in handling a matter.

42. In view of the test of a reasonable man looking at the facts in the disputed cases and the resultant determination in favour of the applicants and the blanket submission that this court has always been biased against them, the conclusion would be that the applicants application has no evidence of actual bias and is based on some extraneous facts known to them.

43. In any case, the court need not determine against an applicant to prove bias. Each case would be determined based on the facts and circumstances prevailing.

44. It is my finding that the application as set lacks merit and does not meet the legal threshold for recusal.

What orders to grant

45. The applicants submitted that this court should disqualify itself from hearing and determining this matter and the same should be placed before another court for determination.

46. As indicated above, the applicants have not proved any bias by this court. As held in Uhuru Highway v CBK & 2 Others CA No. 36 of 1996 (Supra) a court should only then be ready and willing to recuse itself from proceeding with a matter where actual bias is proved. It is indeed true that justice must not only be done but it must be seen to be done.

47. It is imperative to note that this court is a court of justice and a court of law. Having taken oath to do justice without fear, favour, ill will or de affection, this court stands by its oath and thus cannot bent to the whims of litigants who may be perceived to be ranting and crying for attention only for purposes of forum shopping.

48. This court has a duty to dispense justice for both the applicants and respondents and will not be comed down because a litigant has a false apprehension without any basis.

49. I find no reason why I should disqualify myself from hearing this Petition.

50. I therefore find the application before me has no merit.

51. The same is dismissed accordingly and the court will proceed and give further directions concerning the hearing and disposal of this petition.

52. There will be no orders of costs.

RULING DELIVERED VIRTUALLY THIS 5TH DAY OF JULY, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Konosi for Respondents – present

Kahiga holding brief for Karanja for Applicants - present

Court Assistant - Fred