



**Republic v Lake Basin Development Authority; Chere (Exparte Applicant) (Judicial Review E015 of 2022) [2023] KEELRC 2120 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2120 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
JUDICIAL REVIEW E015 OF 2022  
CN BAARI, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**LAKE BASIN DEVELOPMENT AUTHORITY ..... RESPONDENT**

**AND**

**FREDRICK ONYANGO CHERE ..... EXPARTE APPLICANT**

**RULING**

1. Before Court is the Respondent’s Motion application dated June 22, 2023, brought pursuant to Article 50 of the *Constitution*, Sections 1A, (2) of the *Civil Procedure Act* and Order 51 of the *Civil Procedure Rules*, seeking orders that:
  - i. Hon. Lady Justice Christine Baari be pleased to recuse or disqualify herself from hearing and determining this matter
  - ii. The matter be mentioned before any other court for further directions and/or hearing and determination
  - iii. The costs of the application be provided for.
2. The Motion is supported by the grounds on the face thereof and the affidavit of Michael Okuk sworn on June 22, 2023. The basis of the motion is that the Respondent is apprehensive that this court is biased going by the manner in which she has handled several matters that involve the two parties herein.
3. The Respondent avers that it is apprehensive that justice shall not be served in this suit should the Judge continue to preside over the matter. It is the Respondent’s further assertion that their confidence in the judicial process is irreparably eroded and have no more trust in this court.



4. The Respondent/Applicant further argues that the Court did allow them to proceed with the disciplinary process as long as the issues complained of were adhered to now having a fully constituted Board in place. They aver that they were surprised when the Court stopped the process *ex parte* despite having given them a go ahead.
5. The *Ex Parte* Applicant/Respondent opposed the application arguing that it has no reasonable basis. He avers that the Court has done its duty in a fair manner and no specific reasonable ground has been put across to support the application for the Judge's recusal.
6. Counsel for the *Ex parte* Applicant further argues that it is in the discretion of the Court to issue or not issue orders and that the grounds on which the orders were issued were to be canvassed at the interparties hearing.
7. The motion was urged orally on July 26, 2023, where Counsels reiterated their pleadings.

### **Determination**

8. I have considered the Respondent/Applicant's application, the grounds and affidavit in support, the *Ex Parte* Applicant/Respondent's opposition, and the oral submissions by both parties. The singular issue for determination is whether the application meets the threshold for recusal.
9. An application for recusal is premised on Article 50 (1) of the *Constitution of Kenya, 2010*, which entitles every person the right to have any dispute that can be resolved by the application of the law, decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. Such an application calls into question the fairness of a Judge who has sworn to do justice impartially and in accordance with the Constitution and the law.
10. This Court rendered a judgment on March 16, 2023, in respect of the *Ex Parte* Applicant's notice of motion dated October 27, 2022. In that judgment the Court issued final orders as follows: -
  - a. That an order of judicial review by way of certiorari, be and is hereby issued to bring before this Court the Respondent's decision dated September 9, 2022, and proceedings leading to the decision, for purposes of being quashed, and annulled together with all consequential orders made thereon, by the Respondent pursuant to the that decision.
  - b. That an order of judicial review by way of Mandamus be and is hereby issued compelling the Respondent, its agents or any other person acting pursuant to the decision to dismiss the Applicant, to reinstate the Applicant to the previous position held before the letter dismissing him from employment was issued, and to compute and release the *Ex Parte* Applicant's salary which was unlawfully withheld between March 15, 2022, being the date he was placed on suspension with no pay and September 9, 2022, being the date of his summary dismissal.
  - c. That an order of judicial review by way of Prohibition be and is hereby issued restraining the Respondent from purporting to hear, review and determine the disciplinary proceedings involving the parties herein, in the manner that it did, and as complained of by the Applicant, unless it complies with all the applicable laws and principles relating to such an exercise, if at all, it should be found necessary to hear and determine the same after these proceedings.



d. That the costs of this application shall be borne by the Respondent.”

11. The Court on April 27, 2023, issued orders staying disciplinary proceedings initiated by the Respondent/Applicant herein and set the motion for interparties hearing on June 20, 2023. On the hearing date, Counsel for the Applicant herein sought an adjournment and leave to file a further affidavit arguing that he needed to avail a gazette notice appointing the Respondent/Applicant’s Board members.
12. The Court granted the Applicant leave to file a further affidavit and further directed that the hearing of the application will proceed after that filing on the same day.
13. The Respondent/Applicant filed their further affidavit as directed, but when the matter was called for hearing as scheduled, counsel told court that he had instructions to file an application for recusal of the judge. The Court then adjourned the matter to allow the Applicant time to lodge its application, and the instant application was then filed.
14. The question is whether the chronology of events outlined above point to the partiality of this Court in this matter.
15. It has been largely held that the test on whether a Judge should or should not recuse themselves in a matter, is whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased. The East Africa Court of Justice adopted this test in *Attorney General of Kenya v Prof Anyang’ Nyong’o & 10 Others* EACJ Application No 5 of 2007 in the following words:

“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) 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.”

16. The Supreme Court of Canada expounded the test in the following terms in *R v S(RD)* [1977] 3 SCR 484:

“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 a two-fold objective element: 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, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold. The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community. 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.”

17. The general rule in an application such as this, is that a Judge must not recuse herself/himself. The application herein is premised on a mere apprehension of bias on the part of this Court, premised on an order forming part of the judgment rendered on March 16, 2023 which order states thus:

“That an order of judicial review by way of Prohibition be and is hereby issued restraining the Respondent from purporting to hear, review and determine the disciplinary proceedings involving the parties herein, in the manner that it did, and as complained of by the Applicant, unless it complies with all the applicable laws and principles relating to such an exercise, if at all, it should be found necessary to hear and determine the same after these proceedings.”
18. The order restrains the applicant from taking disciplinary proceedings against the Ex parte Applicant in the manner that it did, and which was the issue subject of the judicial review motion. The order went further to require that should it be necessary to exercise disciplinary action against the Ex parte Applicant, the Respondent should comply with the law.
19. The Respondent/Applicant quickly decided to ride on the latter part of the order without giving consideration to the preceding orders of the court emanating from the same judgment, and which then formed the basis for the application staying the proceedings, which later gave rise to the instant application for recusal.
20. In arriving at a decision on whether a Judge should or should not recuse oneself in a suit, one needs to strike a balance between maintaining the appearance of impartiality and the Judge’s duty to sit (See *Justice MK Ibrahim in Gladys Boss Shollei v Judicial Service Commission & Another* (2018) eKLR). Further, it has largely been observed that allowing an application for recusal would encourage forum shopping, and delay in the just and prompt resolution of disputes.
21. The Respondent/Applicant herein, has used every trick in the books to avoid compliance with the orders of this court, including the application for adjournment which the court declined, and which led to the application for recusal.
22. In my view, the circumstances of this case do not give rise to a reasonable apprehension of bias in the mind of a reasonable, fair minded and informed member of the public that the judge did not or will not apply her mind to the case impartially.
23. I hold that the instant application does not meet the objective test as to warrant my recusal from hearing and determining this matter, and is dismissed with costs.
24. It is so ordered.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 21<sup>ST</sup> DAY OF SEPTEMBER, 2023.**

**CHRISTINE N. BAARI**  
**JUDGE**

