



Thuo v County Government of Nyandarua (Employment and Labour Relations Cause 178 of 2018) [2023] KEELRC 2675 (KLR) (31 October 2023) (Ruling)

Neutral citation: [2023] KEELRC 2675 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE 178 OF 2018**

**HS WASILWA, J
OCTOBER 31, 2023**

BETWEEN

RACHAEL NJAMBI THUO CLAIMANT

AND

THE COUNTY GOVERNMENT OF NYANDARUA RESPONDENT

RULING

1. Before me for determination are two applications. The first Application is filed by the claimant dated 17th May, 2023, brought pursuant to Order 51 Rule 1 of the [Civil Procedure Rules](#) and all other enabling provisions of the law, seeking for the following orders; -
 1. Spent.
 2. That the Honorable Court be pleased to order the release of Kshs. 1, 000, 000/ = plus interest thereon until fully released, being the total amount held in the fixed joint interest-earning account No. 08107280007 at Bank of Africa Kenya Limited, Nakuru Branch to the following account on behalf of the Claimant: -

Account Name: Aminga Opiyo Masese & Co Advocates
Bank: Standard Chartered
Branch Name: Nakuru Branch
Account Number: 0102054075500.
 3. That in the alternative, this Honourable do make such other Orders as it may deem just and expedient.
 4. That the costs of this application be provided for.



2. The Application is supported by the grounds on the face of the application and the supporting affidavit of the claimant deposited upon on the 17th May, 2023.
3. The affiant stated That she filed this claim against the Respondent herein in the year 2018 and was awarded Kenya Shillings One Million Only (Kshs. 1,000,000/=) and the decree was issued on 20th January 2022.
4. She states That she painstakingly demanded for the decretal sum, only for the Respondent to seek leave to appeal out of time after Eight Months. Nonetheless That this court granted the Respondent leave to appeal out of time on condition That the same be filed 14 days and the entire decretal sum be deposited in a joint interest account.
5. It is averred That the Respondent deposited the decretal sum Two months later, but is yet to file and serve the record of appeal as ordered by court. It is in this regard That the Claimant believes That there is no appeal against her and as such request That the decretal sum be released.
6. She stated That the application is made diligently and without unreasonable delay.
7. She avers That the claimant's advocate perused the court file and found the Certificate of Delay issued by this Honourable court on 24th March 2023, confirming That the court proceedings which would have otherwise caused delay in compiling the record of appeal have been ready for over a month now.
8. The claimant contends That the appeal is intended to frustrate her from enjoying the fruits of the judgement as the Respondent has failed to abide by the court directives and order.
9. She further states That the delay is causing her great anxiety and is extremely prejudicial in the circumstances. Also That unless the Orders sought are allowed as prayed, her fundamental rights will be defeated as she will continue to suffer economic hardship.
10. The Application is opposed by the Respondent who filed a replying affidavit deposited upon by Joseph Mugo, its senior legal officer working in the Office of the County Attorney.
11. The affiant stated That he has the capacity and the requisite authority to swear this affidavit on behalf of the Respondent and hence competent to swear the same.
12. He stated That the application is misconceived and grossly incompetent and urged the court to dismiss it. He expounded on the issues herein and stated That on 17th January, 2023 the Honourable court allowed the respondent's application dated 29th September, 2022 for extension of time to file a Notice of Appeal out of time against the judgment of 20th January, 2022 on condition That the Respondent deposits the entire decretal sum of Kshs 1 Million into a joint interest account of advocates on record within 14 days.
13. Further That the Court directed That the Notice of Appeal be filed within 14 days from the date of the Ruling as per jurisdiction granted under Section 7 of the [*Appellate Jurisdiction Act*](#).
14. He stated That the Notice of Appeal was lodged timeously on 18th January, 2023 and duly served upon the claimant's advocates on 19th January, 2023.
15. Regarding the issue of deposit of the decretal sum, he stated That there was delay which was occasioned at first instance by counsels for the claimant and later by the respondent County Government due to unavoidable circumstances and thus the money was remitted into the joint account at Bank of Africa on 12th April, 2023 as affirmed by the claimant in her application.



16. He clarified on the delay and stated That immediately after the Ruling of 17th January, 2023, their advocates M/S Kanyi Ngure & Co. Advocates wrote a letter dated 18th January, 2023 to the claimant's advocates M/S Aming'a, Opiyo, Masese & Co. Advocates seeking for the relevant documents for purposes of opening a joint account. That the claimant's advocates furnished the documents for account opening on 25th January, 2023 vide their letter dated 20th January, 2023 addressed to Kanyi Ngure & Co. Advocates.
17. On the same day of 25th January, 2023 their counsel Kanyi Ngure & Co. Advocates visited Diamond Trust Bank, Nakuru and were able to have the joint Bank Account opening forms duly executed by advocates representing both firms being Kanyi Ngure Advocate and Henry Aming'a Advocate. However, That it later emerged That DTB Bank requires execution of the account opening forms by all the partner of Aming'a, Opiyo, Masese & Co. Advocates, including on inactive partner namely Hezbon Richard Owino Opiyo Advocate and therefore the bank account opening forms were returned on 27th January, 2023 for further execution.
18. On 27th January, 2023, its advocates, Kanyi Ngure Advocates forwarded a letter to the claimant's advocate seeking for execution of the Bank Forms and provision of relevant documents by Hezbon Richard Owino Opiyo Advocate who is a co-partner in the law firm of Aming'a, Opiyo, Masese & Co. Advocates.
19. On 1st February, 2023, Mr. Kamau Advocate from the firm of Aming'a, Opiyo, Masese & Co. Advocates contacted their Mr. Kanyi Advocate on his mobile phone and indicated That their co-partner Mr. Hezbon Richard Owino Opiyo Advocate was not actively involved in the running and operations of their Nakuru Office as he was based in Nairobi and thus they were unable to furnish his personal identification documents or secure his signature on the bank account opening forms.
20. Based on these turn of events, Mr. Kanyi Advocate forwarded to the claimant's advocates all the relevant Bank Account opening forms vide the letter dated 1st February, 2023 and thereon requested the firm of Aming'a, Opiyo, Masese & Co. Advocates to proceed and open a joint Bank Account in any other bank where they had good customer relations.
21. On 2nd February, 2023, counsels for both parties executed bank account opening forms from Bank of Africa, Nakuru Branch for purposes of complying with the Court Order of 17th January, 2023 and the next day on 3rd February, 2023 their counsel forwarded an email to the respondent - County Government Indicating That the joint Bank Account Number 08107280007 had been opened at the Bank of Africa, Nakuru Branch and requested the respondent to deposit the decretal amount of Kshs 1 Million as per terms of the Court Order.
22. He reiterated That as at 3rd February, 2023 when the joint account was opened, the time for deposit of the decretal amount within 14 days had already lapsed and mainly on account of delays occasioned by counsels for the claimant.
23. Furthermore, That the joint account was not opened in the names of the law firms on record in the matter since the co-partner of Aming'a, Opiyo, Masese & Co. Advocates had refused to co-operate and therefore the Bank Account was opened in the names of the firm of Kanyi Ngure & Co. Advocates jointly with Henry Aming'a as an individual and not as a law firm which issue did not fully comply with the terms of the Court Order but the respondent chose to deal with substantive compliance of the Court Order instead of dealing with technical matters as a sign of good faith.
24. On 23rd February, 2023, the affiant herein, raised a concern with its advocates relating to compliance of the Court Orders and informed its Advocate That the said Henry. Aming'a Advocate did not have an



- IFMIS Number and therefore the parties in the joint account required to register a joint P.I.N number and a joint IFMIS Number but for expediency purposes Mr. Kanyi Advocate committed to issue an undertaking That their law firm would forward the decretal amount to the joint account within two (2) days if the respondent deposited the entire decretal amount of Kshs 1 Million in the bank account of Kanyi Ngure & Co. Advocates.
25. Following That undertaking, the firm of Kanyi Ngure & Co. Advocates issued a letter giving their undertaking to forward the decretal amount of Kshs 1 Million to the joint account within two (2) days upon receipt of the money into their own Bank Account.
 26. The deponents urged this Court to take judicial notice That the County Governments usually receive funding from the National Government belatedly from mid-March, 2023 so as to start settling the pending bills. Therefore, as soon as they received the said money, they moved with speed and on 4th April, 2023 the respondent released the decretal amount of Kshs 1 Million into the bank account of Kanyi Ngure & Co. Advocates.
 27. On Thursday 6th April, 2023 the firm of Kanyi Ngure & Co. Advocates forwarded the Kshs 1 Million from their bank account at NCBA Bank to the joint account of advocates at Bank of Africa Account No 08107280007 and which funds transfer reflected in the joint account on 12th April, 2023 due to the Good Friday and Easter Monday holiday celebrated between 7th and 10th April, 2023.
 28. Based on That narration, the affiant stated That it is evident That there was a delay occasioned by both the claimant’s advocates and the Respondent-County Government and it would be unconscionable for the claimant to seek to benefit from a delay partly occasioned by her own advocates, for it is trite That “he who seeks equity must come with clean hands’.
 29. Importantly, That the delay on the part of the respondent County Government was not intentional or contumelious but the same arose due to circumstances That were beyond the control of the respondent as it was awaiting funding from the National Government.
 30. Ultimately, That there is no prejudice to be suffered by the claimant since the decretal amount is already secured in a joint interest earning account while awaiting the outcome of the appeal before the court of appeal. A confirmation That the Respondent has been keen in complying with this Court orders.
 31. In respect to filing of the Record of Appeal, it is stated That a Certificate of Delay was issued by court on 24th March, 2023 for collection of the court proceedings and as per the Certificate of Delay the court admitted That a delay of 183 days had been occasioned in regard to typing of proceedings, whereby the Record of Appeal ought to have been filed some 60 days after issuance of the Certificate of Delay i.e. on or before 24 May, 2023 as envisaged by Rule 82 of the Court of Appeal Rules.
 32. Accordingly, That the Record of Appeal was duly filed through the judiciary e-filing portal on 23rd May, 2023 and their appeal serialized as *Nakuru C.O.A Civil Appeal No. E066 OF 2023*. Advance copy of the Record of Appeal was served upon the claimant’s advocates via email and the hard copy served on 24th May, 2023.
 33. He contends That the claimant’s application seeking for release of funds from the joint account on the basis of failure to file a record of appeal is misconceived and untenable as there is an impending appeal on record pending before the court of appeal and if the claimant deems That the Record of Appeal is incompetent then it should invoke the provisions of Rule 84 of the [Court of Appeal Rules](#) to have the Record of Appeal Struck out otherwise the Employment and Labour Relations Court has no jurisdiction to deal with an appeal which is pending before the court of appeal.



34. It was further stated That the application herein is an attempt by the claimant to execute the court's decree given on 20th January, 2022 prior to taxation of costs, when leave of the court has not been sought as envisaged under Section 94 of the Civil Procedure Act.
35. Moreover, That the claimant has not complied with the mandatory procedure stipulated under Section 21 of the Government Proceedings Act prior on commencement of execution proceedings against a County Government.
36. He stated That the procedure adopted by the claimant in seeking to execute the decree is irregular and contrary to the law and thus the application is fatally defective and incompetent, which should be dismissed by this court with costs to the Respondent.
37. The second application was filed by the Respondent dated 12th July, 2023, brought pursuant to Article 47(1) & Article 50 of the Constitution of Kenya 2010, Section 3 & 20(1) of the Employment and Labour Relations Court Act and all other enabling Provisions of the Laws of Kenya, seeking for Orders That; -
1. The Hon, Lady Justice Hellen Wasilwa be pleased to disqualify and/or recuse herself from further proceedings and conduct of this matter.
 2. The matter ought to be placed before any other Judge of the Employment and Labour Relations Court for further proceedings and/or directions.
 3. The costs of this application be in the cause.
38. The basis upon which this application is made is That on 21st June, 2023 at around 02:45 pm the claimant visited the legal department and met Mr. Joseph Mugo Gachambi, a senior legal officer working with the office of the county attorney and thereon the claimant made a comment which appeared to suggest That the judge handling this case was not going to be impartial.
39. It is stated That claimant told Mr. Joseph Mugo Gachambi That there was no need of raising any objections to her application dated 17th May, 2023 filed in court seeking for release of Kshs Million to herself because her advocates on record had already spoken to the judge handling the case Hon. Lady Justice Hellen Wasilwa and the judge had promised That she was going to grant the orders for release of the 1 Million as requested in the claimant's application.
40. That while having regard to all the foregoing matters arising in the case, there is a high possibility That the learned judge Hon. Lady Justice Hellen Wasilwa might unfairly make future rulings and decisions in favour of the claimant in the case.
41. It is contended That if Hon. Lady Justice Hellen Wasilwa continues to handle the matter herein there could arise a clear miscarriage of justice and outright bias. He reiterated That the Respondents is quite apprehensive and certain That if further proceedings in the case continue before Hon. Lady Justice Hellen Wasilwa then, the respondent will never have a fair, proportionate and impartial hearing as envisaged under Article 50 of the Constitution.
42. He stated That justice must be rooted in confidence whereby confidence will be destroyed when a right-minded person goes away thinking and alleging That the judge to the case is biased. Further That justice must not only be seen to be done but the same must manifestly and undoubtedly be seen to be done.



43. It is therefore imperative That the Hon. Lady Justice Hellen Wasilwa recuses herself from the matter herein so as to protect the dignity of the court and also to uphold the fundamental supremacy of the law.
44. The Application is further supported by the affidavit of Joseph Mugo Gachambi, the senior Legal officer, at the Respondent's Government, deposed upon on the 12th July, 2023. The affidavit basically reiterated the grounds of the application herein.
45. The Application is opposed by the claimant through its replying affidavit sworn on 1st September, 2023.
46. The claimant states That the application herein is extremely malicious with the intent to malign this Honorable Court, its advocate and her name to cover up for the Respondent's misdeeds.
47. The claimant denied visiting the Respondents premises on 17th May 2023 or any other day to utter the slanderous words as purported by the Respondent. She maintained That she does not have any intentions of compromising or interfering with this case.
48. She stated That the County Government premises has CCTV surveillance cameras allover and as such the Respondent ought to have annexed the said footage in support of their allegations.
49. She contends That this application has all the intention to manipulate the Honorable court to make decisions in favour of the Respondent to her detriment. She stated That without evidence of their allegations this application should be dismissed forthwith and costs awarded for the damning defamatory statement against her and her advocate.
50. In a rejoinder via a supplementary affidavit deposed upon by Joseph Mugo Gachambi on 25th September, 2023, the affiant corrected his former position and stated That the claimant visited their offices on 21st June, 2023, as he indicated in his personal diary and uttered the said words That the court had been compromised.
51. On the need to have CCTV footage as evidence, the affiant stated That most of the CCTV Cameras at the county government including those within the legal department are out of order since December, 2022, a fact which is confirmed by its ICT department in its letter of 22nd September, 2023 marked as annexure J.M.G-2.
52. He stated That he is an advocate of the high court of Kenya and an officer of the court and thus would not have any reason to peddle lies with the intention of maligning the character of the claimant, her advocates and the honorable court.
53. More importantly, That as an officer of the court, his utmost duty is to ensure That justice is served upon all parties appearing before court and That was the basis upon which he disclosed the comments made by the claimant on 21st June, 2023 to ensure That the dispute before court is resolved in a fair and just manner. He thus prayed for the application for recusal to be allowed as prayed.
54. Directions were taken for the application herein to be canvassed by written submission. The Respondent filed their submission on the 25th September, 2023, however the Claimant opted to rely on their affidavits on record in support of their case.



Respondent's Submissions.

55. The Respondent submitted largely on their application for recusal. They identified one issues for determination being; whether the respondent's application raises reasonable grounds for apprehension of bias and if the same should be allowed.
56. It was submitted for the Respondent That the claimant informed the Respondent's legal office That the Court has been compromised and therefore, should not bother challenging her application. He argued That the visit is evidence by the except of the legal officer's diary attached to the supplementary Affidavit. Conversely, That the Respondent is unable to furnish this Court with CCTV footage in evidence because the said cameras are faulty as evidenced by the letter dated 22nd September, 2023 annexure J.M.G-2 issued by the I.C.T. department of the respondent.
57. He argued That the claimant is disingenuous for insisting That CCTV footage should be availed whereas she is well aware, by virtue of being an employee of the Respondent, That the CCTV Cameras at the legal department have been Out of Order since December, 2022. Further That the claimant has not denied visiting the Respondent on 21st June, 2023, thus the factual statements made on oath by the senior legal officer of the respondent remain uncontroverted.
58. It was submitted That if indeed the words uttered by the claimant were not true, her Advocates could have sworn an affidavit to refute the allegation. He argued That the claimant' Advocate silence thus speaks volumes over the whole issue of recusal by the Judge. To support their argument, the Respondent relied on the case of *Muriithi v attorney General* [1986] KLR 767 the High Court expressed itself thus:
- “ Before a transfer of a case is granted on the application of a party, a clear case must be made out That the applicant has a reasonable apprehension in his mind That he will not get a fair and impartial hearing before the judicial officer from whom he wants the case transferred. A reasonable apprehension of bias means an apprehension on reasonable grounds which has to be a real apprehension honestly held and reasonably based.”
59. Based on the cited case law, the respondent submitted That the main test for recusal is whether a reasonable and fair minded person sitting in court and knowing all the relevant facts would have reasonable suspicion That a fair trial for the applicant would not be possible.
60. Similarly, That based on the issues raised by the respondent, which were not controverted by the claimant, it is highly likely That the claimant actually made the statements in question to the senior legal officer of the respondent on 21st June, 2023. Further That it is highly probable given the facts as presented, any right minded person would go away thinking and alleging That the judge to the case is biased.
61. Therefore, That the Respondent is justified as per the facts presented to be apprehensive and certain That if further proceedings in the case continue before Hon. Lady Justice Hellen Wasilwa then, there could be future rulings and decisions unfairly made in favour of the claimant in this case.
62. The Respondent buttressed their argument by relying on the case of *Thugi River Estate Limited v National Bank of Kenya Ltd & 2 Others* [2014] eKLR at page 5, where the Court held That:-
- “ It is settled principle That justice must not only be but must also be seen to have been done, The applicant herein feels That justice may not be done if I continue to handle this matter. Much as I find That apprehension far-fetched, I would not hesitate to recuse myself if only



my recusal would give the applicant the confidence to approach the court for arbitration of this matter and also to remain assured That justice would indeed be done. The parties do approach the court seeking for justice and it is my believe That all parties in this matter are in court seeking for justice. I would therefore not wish to stand as an obstacle on the way of any litigant who is in pursuit of justice. For the above reasons I will therefore proceed to recuse myself from further handling of this matter. Consequently, I will refer this matter to the Presiding Judge, of Environment and Land Court for further directions.”

63. In conclusion, the Respondent submitted That ultimately, it is in the interest of justice That the application dated 12th July, 2023 is allowed for the claimant has failed to make any credible challenge to the application.
64. I have examined all the averments and submissions of the parties herein.
65. Concerning the 2nd application dated 12/7/2023 in which the applicants seek my recusal on account of the fact That the applicant visited their offices on 21st June, 2023 at 2.45pm and met one Joseph Mugo and made a comment which appeared to suggest That this court was not going to be impartial, the applicant has denied making any such comments leave alone visiting respondent’s offices as alleged.
66. That as it may be, the respondents failed to prove with any finality That the applicant visited their offices as alleged. No CCTV footage was supplied to court nor was any document given to show the applicant visited the respondent’s premises. This court has no personal knowledge of who the applicant is nor has it ever interacted with her at any time. The insinuation by the respondents are meant to slow down this court from proceeding to dispense justice. I find no tangible evidence submitted before this court to warrant its recusal. I therefore find the application without merit and I dismiss it accordingly.
67. As concern the application dated 17th May 2023 seeking release of moneys ordered deposited in a joint interest earning account held in joint names of the counsels on record, the applicants have set out the events leading to the depositing of the said moneys and the reasons for the delay.
68. The applicants have also explained what led to the delay in filing the record of appeal before the Court of Appeal which record has since been filed.
69. Given That the Court of Appeal is currently seized of this matter, I see no reason why I should interfere with orders already given which orders allowed the filing of the appeal subject to depositing of the 1Million. This would be tantamount to sitting on appeal to orders I have granted.
70. I find the application is therefore unmerited and I dismiss it accordingly.
71. Costs in the cause.

RULING DELIVERED VIRTUALLY THIS 31ST DAY OF OCTOBER, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

