



**Kenya Plantation & Agricultural Workers Union v Shalimar Flowers Limited
(Cause 57 of 2021) [2023] KEELRC 2615 (KLR) (26 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2615 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 57 OF 2021
DN NDERITU, J
OCTOBER 26, 2023**

**BETWEEN
KENYA PLANTATION & AGRICULTURAL WORKERS UNION .. CLAIMANT
AND
SHALIMAR FLOWERS LIMITED RESPONDENT**

RULING

I. Introduction

1. The claimant commenced this cause, for and on behalf of the grievant, Maurice Simiyu, by way of a memorandum of claim dated 7th October, 2021 filed in court on 18th October, 2021 seeking for the following reliefs –
 1. An order directing the respondent to
 - (a) To unconditionally reinstate the grievant without loss of benefits.
 - a. To pay the grievant for the entire period he was dismissed.
 2. Should prayer 1 above fail, an order directing the respondent to
 - a. Salary arrears for all days worked based on gross pay.
 - b. Salary *in lieu* of the notice as provided for in the Memorandum of understanding.....
....Basic Kshs.13200 X 2 months = Kshs.26,400/=



- c. Pay for grievant salary for a period of 12 months as compensation for wrongful and unfair termination.....Kshs.158,400/=
 - d. Pay gratuity for a period of 9 years.....
.....24X9X440 =Kshs.95,040/=
 - e. Pay leave travelling allowance for the period of dismissal till judgment.
 - f. Pay the cost of this suit
 - g. Interest on (a), (b), (c), (d) (e), (f), above
 - h. Any other relief the honourable court deems fit.
2. The respondent entered appearance on 19th November, 2021 through it's representative, Agricultural Employer's Association, and a memorandum of defence was filed on 17th January, 2022.
 3. The matter was then listed for mention before this court on 22nd November, 2021 ostensibly for directions but neither of the parties appeared and the file was returned to the registry for parties to move the court. On 23rd February, 2022 the claimant applied for and was allocated 16th March, 2022 for mention. Again, on this latter date neither party appeared in court and the file was again returned to the registry. The claimant then fixed the matter for mention on 19th July, 2022 and on this date the matter was fixed for hearing on 18th October, 2022 but the hearing did not take off on this date; the court did not sit as the judge was away on official duty (workshop). The claimant then fixed the matter for mention on 25th January, 2023 for purposes of taking a hearing date. Again, neither party appeared and as such the court fixed the matter for mention on 22nd February, 2023 for purposes of taking a hearing date. On this date the cause was allocated 27th March, 2023 for a physical hearing in open court.
 4. On 27th March, 2023 Mr. Musumba appeared for the claimant and Miss Kimuge for the respondent. The respondent made an application for adjournment for purposes of substituting their witness but the court ordered the matter to proceed as the claimant was in court and ready to proceed with his case. However, the matter did not proceed as the court noted that Mr. Musumba prosecuting the matter in court is not a qualified advocate and as such advised the claimant to engage a professional lawyer as otherwise the role that the said union officer would pray was, in the opinion of the court, limited to appearing as a witness or representative of the union but not in leading witnesses and such other roles reserved by law for qualified lawyers. The court allocated 15th May, 2023 for hearing of the cause to enable the claimant sort out the issue of representation. The respondent was also granted leave to substitute the witness and file fresh witness statement(s).
 5. On 15th May, 2023 Mr. Muimi, advocate, appeared for the claimant and Miss Wachira, advocate, appeared for the respondent holding brief for Mr. Kinyanjui, for hearing in open court. The grievant, Maurice Simiyu (CW1) commenced his testimony but as it turned out the claimant had not served its bundle of documents upon the respondent. Mr. Muimi had also not filed and served his notice of appointment to act for the claimant. For the foregoing reasons, to which Mr. Muimi conceded, the hearing could not proceed and the hearing was adjourned for the claimant to comply with the two issues – Mr. Muimi to file and serve a notice of appointment and a properly prepared and paginated bundle of documents. The claimant was ordered to pay court adjournment fees of Kshs.1,000/= and respondent's costs of Kshs.7,000/= making a total of Kshs.8,000/= before the next hearing date which was fixed for 26th June, 2023.



6. On 26th June, 2023 Mr. Muimi appeared for the claimant and Miss Wachira for the respondent. Mr. Muimi informed the court that the claimant had not complied with the orders of 15th May, 2023. Further, counsel for the claimant informed the court that the claimant desired to file an application for the recusal of this court from hearing the cause. The hearing then collapsed for the foregoing reasons and the matter was fixed for mention on 31st July, 2023 for the intimated application to be placed on record and for the claimant to comply with the orders of 15th May, 2023 on payment of costs.
7. It is important to state that when the court proceeded to the open court later on 26th June, 2023 the grievant stood up in court and wondered why his matter had not been called out yet he was ready to proceed with the hearing. The court informed him of what had transpired during the virtual call-over in the morning, as enumerated in the foregoing paragraph, and advised him to get in touch with his lawyer, Mr. Muimi. When the court informed him that his lawyer had informed that he was to file an application for the court to recuse itself from handling the matter he expressed his displeasure and stated that he had no knowledge of the same and had not given instructions to the claimant on filing such an application.
8. On 31st July, 2023 the court directed that the application, now on record and dated 19th June, 2023, be canvassed by way of written submissions.

II. The Application

9. The notice of motion dated 19th June, 2023 (the application) is expressed to be brought under Articles 50 and 159 of the *Constitution*, Sections 1A, 1B, 3A, & 63(e) of the *Civil Procedure* Rules and Regulations 5 and 9 of the *Judicial Service (Code of conduct and Ethics) Regulations*, 2020, and all other enabling provisions of the law. The claimant is seeking the following orders –
 1. THAT the Application herein be certified as urgent and directions be issued ex-parte in the first instance.
 2. THAT the trial Judge Honourable Justice David Nderitu be pleased to disqualify himself from hearing or presiding over this matter and the Court file be transferred to the Presiding Judge Employment and Labour Relations Court for reallocation.
 3. THAT the costs of the Application be in the cause.
10. The application is supported with the affidavit of Thomas Kipkemboi, the secretary general of the claimant, sworn on 19th June, 2023.
11. The respondent opted not to take part in the application and filed no papers in regard to the application.

III. Analysis

12. In the entirety of the application, the claimant is seeking that this court recuses itself from handling and hearing of this cause because according to the claimant it is apprehensive that it will not receive an impartial hearing as the presiding judge has allegedly acted with bias against the claimant.
13. In the supporting affidavit the claimant states that this cause has been pending in court since 2021. It is stated that on 15th May, 2022 the court stood down the grievant, CW1, on allegations that the documents filed by the claimant were not in good order and ordered the claimant to pay costs. It is further alleged in paragraph 8 of the supporting affidavit that “Previously, on diverse dates, when this



- claim came up for hearing, the Learned Judge has stood down the Applicant’s witness and proceeded to adjourn the matter on flimsy grounds”. It is imperative that the alleged diverse occasions on which the court adjourned the matter are not disclosed and the alleged flimsy grounds are not stated.
14. Further, it is alleged that the court has stopped union officials of the claimant from prosecuting matters contrary to express provisions of the law. It is also alleged that the court has made negative remarks about the claimant and its representative and expressed frustration with representatives of the claimant handling the matters in the court. Again, it is not stated why and when the judge expressed such frustrations.
 15. In the written submissions, counsel for the claimant has cited the provisions of Article 50 of the Constitution and Regulation 21(1) of the Judicial Service (Code of Conduct and Ethics), 2020 on the requirements that a judicial officer be impartial and the need for recusal where the impartiality of the officer might be reasonably questioned.
 16. Counsel has cited *President of the Republic of South Africa V The South African Rugby Football Union & Others* CCT/98 and *Philip K. Tunoi & Another V The Judicial Service Commission & Another* (2016) eKLR wherein the Court of Appeal cited Porter V Magill to the effect that – “The Court has to address its mind to the question as to whether a reasonable and fair minded man sitting in the Court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible. If in the affirmative, disqualification is inevitable.”
 17. It is on the basis of the foregoing that the claimant is asking this court to recuse itself and submit the matter to another court for hearing and disposal.

IV. Determination

18. The court has set out in detail the relevant facts and circumstances of this cause in the introductory part of this ruling, as extracted from the court record which is public and open for scrutiny by the claimant and indeed any member of the public.
19. This cause was filed in court on 18th October, 2021 and has come up in court for hearing on three occasions. On 27th March, 2023 when the cause first came for hearing the court expressed that the officer from the claimant, Mr. Musumba, was not a qualified advocate and expressed its concern that he could not prosecute the matter as a qualified advocate as he is not admitted as such. The court politely and in good faith advised the claimant to consider hiring a qualified advocate to conduct the matter. This suggestion or proposal from the court was not at any rate intended to demean or take away the right of the said officer to appear in court as such officer for the claimant. What the court stated in not so many words is that the said officer is not a duly admitted advocate and as such cannot practice law in the courts as a duly admitted advocate.
20. This court has delivered several rulings on the issue of the extent to which an officer or official of a union can go in representing a grievant in court as opposed to such officer or official appearing as a representative of the union – See for example – Nakuru EIRC Cause No. 240 of 2018 – *Kenya Engineering Workers Union V Rift Valley Engineering Limited*.
21. As can be deciphered from the foregoing ruling, this court has not at any point held that union officials or officers cannot appear in court and therefore counsel for the claimant has completely misapprehended this court’s position.
22. In any event, after the court advised that it would be advisable for the claimant to engage a lawyer the claimant engaged Mr. Muimi, who has been conducting the claimant’s case ever since. This by



implication means that the claimant indeed heeded to the advice from the court and, reasonably, one would assume that the issue of representation ended there.

23. The matter came up again for hearing on 15th May, 2023 when the grievant (CW1) commenced his testimony. Along the way, however, when he attempted to produce the documents filed as claimant's exhibits, counsel for the respondent objected stating that she had not been served with the same and that Mr. Muimi for the claimant was not properly on record as no notice of appointment of advocate had been filed. Counsel for the claimant, Mr. Muimi, conceded to the objection by counsel for the respondent and undertook to file and serve a properly paginated bundle of documents and a notice of his appointment to act for the claimant. It is on the basis of the forgoing that the matter was adjourned and the claimant was ordered to pay court adjournment fees of Kshs.1,000/= and respondent's costs of Kshs.7,000/=. The record indicates that the claimant has not complied with this order to this day.
24. It should not be lost on any litigant that if and where a litigant is dissatisfied with a court order or judgment there are at least two lawful options available to such a party. One, the aggrieved party may apply for review, or two, the party may appeal against the offending order or judgment. That is what the rule of law dictates and it is by those rules that courts operate in a civilized and mature democracy such as Kenya.
25. This cause then came up again for hearing on 26th June, 2023 when counsel for the claimant confirmed that indeed the claimant had not complied with the orders of 15th May, 2023. He did not make an application for review of those orders or stay of the same so as to enable the matter to proceed to hearing. Instead, counsel indicated that the claimant was making an application for recusal of this court from handling the matter pointing out that the intended application should take priority. For that reason and to avoid further unnecessary delays and arguments and considering that an application for recusal is so core to any proceedings, the court allowed the application for adjournment. In any event, the claimant having not complied with orders of 15th May, 2023 had no right of audience in court.
26. The events explained in the foregoing paragraph occurred during the virtual court in the morning call-over. For record, when the court proceeded to open court for the hearing of other matters listed for that day, the grievant was in court ready for the hearing of his cause and he bitterly complained that he was not aware and could not understand why his cause could not proceed. Of course, the court politely and patiently explained to him the aforesaid events that had occurred earlier in the morning during the virtual call-over and advised him to contact his lawyer.
27. For completeness, the only other time when this cause came up in court for hearing was on 18th October, 2022 when, and the record bears witness that the court was not sitting as the judge was away on official duties.
28. The court is aware and very alive to the judicial code of conduct and ethics and the principles applicable to judicial officers in delivery of judicial services. Of course, impartiality is a core principle as no man should be a judge in his or her own case. Impartiality is broken when a judge has an interest in a matter by virtue of a personal interest, that of a spouse, member of his/her family, a friend, an associate, or in whatever other manner conceivable.

The rationale and logic is that, an interest in a matter obscures the view of the judge, making him or her to descend into the arena of the combatants, suffer prejudice or bias, and ultimately the judge fails to be fair and just in the disposal of the subject matter.

29. It is commonsense that once a judge realizes that he or she has an interest in a matter he or she should not take any further step in the matter but should recuse himself or herself at the earliest opportunity and submit the matter to an impartial court to deal. It would be against the law, ethics, morals, and



the eternal conscience for a judge to continue handling a matter wherein he or she has an interest or has come to learn of such interest, no matter how remote, as continuing handling such a matter goes against the oath of office that each judge or judicial officer takes before commencing duty. This is what this court stands for and shall forever live for.

30. It is alleged that this court has adjourned this cause on many occasions on flimsy grounds. I have thrashed through the record and other than what is analyzed in the foregoing paragraphs, I am not aware of and have not come across any other days or dates on which this matter came up in court for hearing. The claimant has not identified those other alleged dates as I have accounted for all the dates when this matter has come up in court for hearing and stated the reasons for which the matter did not proceed as articulated in the foregoing paragraphs.
31. I wish to state categorically that I have neither any interest whatsoever in this matter nor bias for or against either party. I should have recused myself the very first day that the cause came before me if that was the case, as this court stands for and shall eternally stand for professionalism, impartiality, fairness, rule of law, and justice.
32. It is unfortunate that this matter has now dragged on for the last five months for this rather strange and unfounded application, which is truly baseless and predicated on misconceived misunderstanding of the law, to be heard and determined. If and where a party is dissatisfied with an order or judgment from the court the proper and recognized legal way of challenging the same is by way of an appeal or review. If it is allowed that every dissatisfied party applies for the recusal of the judge trials shall then become mockery to justice and forum-shopping shall be entrenched.
33. The court is pained and disappointed with this application. Mr. Muimu has informed the court that he is a duly qualified advocate of the High Court of Kenya and as such, the best he should have done is to ensure that the matter progresses quickly to hearing and disposal. If one of the initial issues was representation, it was then clearly resolved when he came on record for the claimant.
34. However, even as I write this ruling there is no notice of appointment of advocate on record and if one has been filed a hard copy has not been placed on record, notwithstanding that Mr. Muimi promised to file the same on 15th May, 2023. Surely, is it the court that has delayed the hearing of the matter or is it the claimant? Without prejudice, the court notes that there is an application to amend the memorandum of claim filed in court on 31st August, 2023. It is that application that should have been heard and determined on priority basis instead of this frivolous, baseless, misconceived, and unfounded application for recusal of the court.
35. It needs no reminder to the claimant that while a union has a legal right to file and represent a grievant, the cause truly belongs to the grievant who has come to court probably hurting and seeking for justice. It is bizarre that in all the pleadings filed, including the instant application, the grievant does not feature anywhere. As noted elsewhere in this ruling, on 26th June, 2023, when the claimant informed the court that it was making an application for recusal of this court, the grievant was in open court ready and willing to be heard.
36. The court has this far said enough in demonstrating that the application herein is misguided and misconceived and the same is hereby dismissed with no order as to costs. The claimant has not at all persuaded and or convinced this court that a reasonable person examining and analyzing the facts and the circumstances of this cause (See - Porter V Magill, *Philip K. Tunoi & Another V Judicial Service Commission* (Supra), *Jabir Rai & Others V Tarcholan Sing Rai & Others*) would conclude that the claimant shall not be served justice by this court in this cause. Contrary to the position adopted by the



claimant, and this court hereby assures the claimant, the court shall hear and determine this cause on merits based on the facts, evidence, and the law and nothing more.

37. Consequently, the matter shall proceed to hearing on priority basis in view of the time lost in adjournments and even in the hearing and disposal of this application.

DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 26TH DAY OF OCTOBER, 2023.

DAVID NDERITU

JUDGE

