Maseno University v University Academic Staff Union, Maseno Chapter (Petition E015 of 2021) [2022] KEELRC 3929 (KLR) (22 September 2022) (Ruling)

Neutral citation: [2022] KEELRC 3929 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION E015 OF 2021

CN BAARI, J

SEPTEMBER 22, 2022

BETWEEN

MASENO UNIVERSITY .... APPLICANT

AND

UNIVERSITY ACADEMIC STAFF UNION, MASENO CHAPTER .... RESPONDENT

RULING

1. Before court is the respondent's motion application dated May 23, 2022, brought pursuant to articles 1, 2, 3, 10, 25(c), 48 & 50 (1) of the *Constitution*, sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 51 (1) of the *Civil Procedure Rules* and part II of the *Judicial Code of Conduct*, seeking orders that:
   i. Spent
   ii. Spent
   iii. Hon Lady Justice Christine Baari be pleased to recuse herself from the present proceedings
   iv. The petition be transferred to Employment and Labour Relations Court at Kisumu (Justice Stephen Radido) for further hearing and determination
   v. The honourable court be pleased to make such further orders as it may deem fit to further the ends of justice
   vi. The costs of the application be in the cause.
2. The motion is supported by the grounds on the face thereof and the affidavit sworn by one Joy Akinyi on May 23, 2022. The basis of the application is that the Respondent has filed four applications seeking various orders and which are still pending before court and that the trial court has insisted on writing judgment of the main petition before determination of the applications.

3. The respondent further avers that without hearing the merit of the application for stay of proceedings, the court made a finding that the respondent had not justified their reason to have the court delay the scheduled judgment, and that the fact that the respondent had filed an appeal against the previous orders of the court was not sufficient ground to stay proceedings.

4. The petitioner opposed the application *vide* grounds of opposition dated May 26, 2022.

5. Parties canvassed the motion by way of written submissions and which have been duly considered.

Determination

6. I have considered the respondent's application, the grounds and affidavit in support, the petitioner's grounds of opposition, and the submissions filed for both parties. The singular issue for determination is whether the application meets the threshold for recusal.

7. 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*.

8. On February 3, 2022, this court rendered a ruling on the Respondent's application dated June 29, 2021. Being dissatisfied with the decision of the court, the Respondent lodged an appeal before the court of Appeal, and thereafter filed another application, seeking amongst others, a stay of all further proceedings in this matter, pending hearing and determination of the appeal.

9. On March 23, 2022, the court issued directions on the hearing of both the respondent's applications and the petition, wherein, it directed parties to file submissions on the two applications and the petition and thereafter, the court would render judgment on both the petition and the applications.

10. 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."

11. 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."

12. 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 suggestion of appearance of bias. In the case of *Teachers Service Commission v Kenya Union of Teachers & 3 Others*, CA No 196 of 2015 it was held that an application for recusal must be based on reasonable grounds.

13. 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 M K 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.

14. The court's directions subject of the instant application would not in my opinion lead a reasonable and informed person to the conclusion of biasness on the basis of predetermination. However, to maintain the appearance of impartiality, I am inclined to allow the application as prayed.

15. The upshot is that the respondent's application is allowed with the effect that I recuse myself from hearing this suit, and further direct that the same be placed before Justice Stephen Radido for hearing and final determination.

16. The costs of the application shall abide the outcome of the petition

17. It is so ordered.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 22ND DAY OF SEPTEMBER, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

N/A for the Respondent/Applicant

Mr. Onsongo present for the Petitioner/Respondent

Ms. Christine -C/A