



**Khisa v Kenya Plantation & Agricultural Workers Union (Petition  
E009 of 2021) [2022] KEELRC 3907 (KLR) (16 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3907 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
PETITION E009 OF 2021  
DKN MARETE, J  
SEPTEMBER 16, 2022**

**BETWEEN**

**MESHACK KHISA ..... PETITIONER**

**AND**

**KENYA PLANTATION & AGRICULTURAL WORKERS  
UNION ..... RESPONDENT**

**RULING**

1. This is an application by way of notice of motion dated July 19, 2021 and comes out thus;
  1. That this application be certified urgent and be heard in priority over all matters herein.
  2. That this honourable be pleased to transfer the hearing and determination of this Petition to Nakuru where the alleged constitutional violations took place.
  3. That in the alternative but without prejudice to the above, the learned presiding Judge Justice Njagi Marete do recuse himself from hearing this matter forthwith.
  4. That the costs of the application be in the cause.
2. It is grounded as follows;
  1. That the applicant has filed a constitutional petition before this honourable court.
  2. That all constitutional petitions are regulated in terms of procedure by the practice and procedure rules (protection of rights and Fundamental freedoms) 2013 otherwise known as Mutunga rules.
  3. That consequently neither the *ELRC Court Procedure Rules* nor the *Civil Procedure rules* are applicable to constitutional petitions.



4. That under rule 8(1) thereof every case shall be instituted in the High Court within whose jurisdiction the alleged violations took place.
  5. That there is no dispute that the alleged constitutional violations took place in Nakuru where the respondent is based.
  6. That the nearest court is therefore the ELRC court Nakuru.
  7. That for reasons best known to the petitioner he is chosen to file the current proceedings in Nyeri.
  8. That the above action amounts to forum shopping and should not be allowed at all.
  9. That there exists a perception of potential biasness on the part of the presiding Judge as the Petitioner was the presiding Judge's witness during proceedings against the presiding judge at the tribunal established to determine whether or not the presiding Judge should be removed from office.
  10. That by dint of the above, and in all the circumstances adverted to herein above, the respondent is reasonably apprehensive that the scales of justice will not be held evenly.
  11. That justice must not only be done but must also be seen to be done.
  12. That in the circumstances it is only fair and just that the presiding Judge Justice Marete recuses himself from this matter forthwith.
3. The respondent in a replying affidavit sworn on July 21, 2021 denies and objects to the application and prays that it be dismissed with costs.
  4. The application is premised on the following issues of law and fact; This matter should be transferred to Nakuru where the alleged violations took place. That for reasons disclosed the Judge should recuse himself from this matter forthwith. That the perception of bias and therefore injustice must be settled before any other issues on the petition. That rule 8(1) of the *Mutunga rules* directs that every case shall be instituted in the High Court within which the alleged violation took place. That the proper jurisdiction for this cause is the ELRC, Nakuru and not Nyeri. That the filing of these proceedings in Nyeri amounts to forum shopping and should be disallowed. That the petitioner doubled as the judges witness during tribunal proceedings against the judge for his removal and therefore a perception of bias. That the respondent, KPAWU, made a decision to have the petitioner herein to testify at the tribunal as the complaint arose out of one of the respondents matter which is well known to the petitioner. That as such witness, the petitioner interacted closely with the judge and therefore wishes to take advantage of this in these proceedings. That in view of the above, a recusal of the Judge be had.
  5. The petitioner/respondent in a replying affidavit sworn on July 21, 2021 answers and avers as follows; That the applicant has not approached the court with clear hands in that the supporting affidavit in support of the application is premised on a forged signature of dr Francis Atwoli, the respondent's General Secretary. That there is no possibility that he swore the affidavit as on this date, and attended a political rally at Tana River with the hon Raila Odinga. That the petition is rightly filed in this court. That the respondent is a national trade union with a registered office in Nyeri. That this court has a national jurisdiction. That all proceedings in this cause are virtual and can be had from all locations in accordance with the Covid 19 High Court Practice Rules and directions of March 15, 2020. That he is opposed to a transfer of this matter to Nakuru as dr Atwoli is a close friend of Wasilwa, J and has related to her and therefore a possibility of bias and impartiality. That he was not the Judges witness at the tribunal but instead had been summoned to testify by the secretary to the tribunal. That he has not



interacted with the Judge, or at all. That the averments by Dr Atwoli in support of the application are procedural technicalities well taken care of by article 159 (2) (a) (b) and (d) of the Constitution as read with rule 25 (4) of the Employment and Labour Relations Court (Procedure) Rules, 2016.

6. This application must therefore fail. This is because it is crafted and grounded on quick sand and its factual and legal basis wanting.
7. The applicant/respondent relies on eventualities at the tribunal investigating the conduct of the Judge concluded in September, 2020. It is her testimony that the petitioner herein participated and tendered evidence in support of the Judge and therefore is seeking a favorable outcome from this court.
8. This is denied by the petitioner. He admits testifying but on the instigation of the secretary to the tribunal, not the Judge. The respondent/applicant neither disapproves this but also does not tender any evidence on this issue.
9. The respondent further denies the national jurisdiction of this court. It is his argument and submission that the petition falls within the premises of the Mutunga Rules and therefore must be enrooted to its territorial jurisdiction – Nakuru. It is his submission that national jurisdiction would not suffice, this being a matter touching on the Mutunga rules jurisdiction.
10. Nothing can be further from the truth. That this court has enjoyed national jurisdiction is not in dispute. The applicant's submission on the Mutunga rules being his basis for jurisdiction fall by the wayside.
11. The petitioner/respondent also submits a case of bias at the ELRC-Nakuru on the basis of the deponent's association with the presiding Judge. He tenders evidence to this extent and narrates on the eventualities at the tribunal investigating the conduct of the Judge. It is his case that the petitioner involved and testified on behalf of the judge on the instigation of the union, KPAWU. This is denied by the petitioner/respondent. It is his case and evidence that he testified at the tribunal on the invitation by the tribunal's lead counsel and not the Judge.
12. The respondent/petitioner also comes out to oppose the application on grounds that the general secretary of KPAWU who also doubles as the COTU Secretary General is close and relates to Wasilwa, J., the presiding Judge of this court at Nakuru. It is his case that this relationship would not auger well for a transfer of the matter as he is unlikely to get justice in the circumstances.
13. This is a storm in a tea cup. Every Judge in this court has the potential of rubbing shoulders with dr Atwoli - the COTU Secretary- General. The prominence of his position and its overwhelming power and conspicuous presence in the labour sector makes him unavoidable to the court including her judges and other staff.
14. Again, the court participates in several labour sector activities and is therefore familiar with many of the industry actors. These insinuations arguments, and accusations inter partes are not new or a big issue.
15. The overwhelming criteria for a case for recusal is an apprehension or bias on the part of the court or presiding officer or judge. This would arise in a situation where a reasonable person looking at the facts and circumstances of the case would visualize a case of bias on the part of the court. Parties seeking such recusal must ably demonstrate a case of bias on a balance of probabilities. This is not met in the circumstances of this application.
16. The application on the whole lacks basis in law, fact and evidence. It is not based on any credible evidence or legal basis. It does not meet the threshold set out for recusal or even transfer. It must fail.
17. I am therefore inclined to dismiss the application with costs to the petitioner/respondent.



**DATED AND DELIVERED AT NYERI THIS 16<sup>TH</sup> DAY OF SEPTEMBER 2022.**

**D.K.Njagi Marete**

**JUDGE**

**Appearances**

1. Mr. Aduda instructed by Aduda & Co.Advocates for the Applicant/Respondent.
2. Meshack Khisa, Petitioner/Respondent in person.

