



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 2181 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

TRAILINK GROUP LIMITED.....CLAIMANT

VERSUS

KENYA LONG DISTANCE TRUCK DRIVERS AND

ALLIED WORKERS UNION.....RESPONDENT

RULING 6

Pending for determination before me are two Applications filed by the Claimant herein. The first Application is the Notice of Motion Application dated 27th August, 2020 seeking the following Orders **THAT**:-

1. Spent.
2. The Court be pleased to allocate this matter before any other Judge other than Onyango J.
3. The Notice of Motion Application dated 14th August, 2020 and filed in Court on 14th August, 2020 be allocated to any Judge other than Onyango J.

The Application is premised on the grounds **THAT**:

- a. Onyango J. has demonstrated bias towards the Claimant in proceedings held before her on 22nd October, 2019 when she suo moto dismissed the Claimant's Preliminary Objection which was properly filed and on record.
- b. On 22nd October, 2019 Onyango J. declined the Claimant's counsel to cross examine the alleged 140 grievants who never testified at the Trial before Nduma J.
- c. The dismissal of the Claimant's Preliminary Objection and the refusal to allow the Claimant's counsel to cross examine the alleged 140 grievants is the subject of an Appeal namely Civil Appeal No. 589 of 2019.
- d. On 20th December 2019 Onyango J. delivered a ruling in favour of the Respondents which ruling did not disclose a monetary award
- e. On 10th July, 2020 the Deputy Registrar purported to tax a Bill of Costs dated 18th May, 2018 and in a ruling dated 7th August 2020 imposed a monetary award of Kshs.21,436,164/= as a basis of assessing instruction fees which award is not contained in either the Judgment of Nduma J. dated 27th May, 2017 or the Ruling of Onyango J. dated 20th December, 2019.
- f. The Claimant is aggrieved and dissatisfied with the manner in which Onyango J. handled this matter and has lodged a Petition with the Judicial Service Commission seeking her removal from the Judiciary and is apprehensive that Onyango J. cannot do justice in this matter and should recuse herself.

The Application is further supported by the Affidavit of **PETER NJENGA**, the Claimant's Manager Human Resource Service Company sworn on 27th August, 2020 in which he reiterates the grounds as set out on the face of the Notice of Motion Application.

The Application is filed under Section 12 of the Employment Act, Rules 17 and 26 of the Employment Rules and Practice Directions and Article 50(1) of the Constitution of Kenya, 2010.

The second application is a Notice of Motion application dated 18th December 2020 also filed by the Claimant/Applicant seeking the following Orders **THAT**: -

1. Spent.
2. Onyango J. be pleased to hear and determine the Applicant's Application for recusal dated 27th August 2020 on a priority basis before further hearing and determination of the Applicant's Application for stay of execution dated 14th August 2020 and scheduled for delivery of ruling on 21st January 2021
3. The Court be pleased to stay the delivery of the ruling in the Applicant's Application for stay of execution of final decree dated 14th August 2020 and scheduled for delivery on 21st January 2021 pending hearing and determination of this Application.
4. The interim orders of stay of execution granted pursuant to the Application dated 14th August, 2020 be extended pending the hearing and determination of the recusal Application.
5. Costs be provided for.

The Application is premised on the grounds **THAT**: -

- a. The Applicant filed its Application dated 27th August, 2020 seeking recusal of Onyango J. on account of bias and lack of impartiality in this case especially on 22nd October 2019 when she dismissed the Applicant's Preliminary Objection dated 24th September, 2019 suo moto and declined to grant leave to the Applicant's Application to cross examine the 140 alleged grievants who never participated in the trial conducted before Nduma J.
- b. The above Orders triggered the filing of Civil Appeal No. 589 of 2019 and an Application for stay of further proceedings which are both pending before the Court of Appeal.
- c. Pursuant to the Order of Taxation made by the Deputy Registrar on 7th August, 2020 the Applicant filed an objection to taxation seeking the deputy Registrar's reasons for taxation which were not availed and also filed an Application for reference challenging the taxation and further sought for orders of setting aside of the taxation order which Application remains pending in court.
- d. The Certificate of costs, a final decree and warrants of attachment in this matter were issued before the expiry of 14 days allowed by law to challenge Taxation orders.
- e. The Applicant is exposed to an imminent and illegal monetary decree which is neither compatible with the Judgment of Nduma J. dated 26th May, 2017 nor the ruling of Onyango J. dated 20th December, 2019.
- f. There is a pending Application for stay of execution dated 14th August, 2020 that is yet to be argued pending the hearing and determination of the instant Application which takes precedence over it.
- g. The Applicant has no confidence in the Court presided over by Onyango J. and is apprehensive that she will not render justice and has even proceeded to lodge a Petition seeking for the removal of the Judge with the Judicial Service Commission on grounds of gross misconduct and in particular *orders of 22nd October, 2019*.

The Application is further supported by the Affidavit of **SOLOMON WAMWAYI**, Counsel on record for the Claimant/Applicant sworn on 18th December, 2020 in which he reiterates the grounds as set out on the face of the Notice of Motion Application.

In response to both Applications the Respondent filed its Replying Affidavit deposed by **NICHOLAS MBUGUA**, the Respondent Union's Secretary General on 25th January, 2020 in which he avers that the two applications pending for determination lack merit and are incompetent ab initio. He further deposes that the same are an abuse of the Court process and urged this Court to dismiss the Applications with costs to the Respondent.

He states that this Court has not at any point showed any bias as against the Applicant as it contends and that the Court has been performing its duties in a fair and just manner as envisaged in the Constitution of Kenya, 2010.

The Affiant deposes that the Court proceedings of 22nd October, 2019 were not biased and that the Court did give a well-reasoned ruling on its refusal to allow the Applicant's Application to cross examine some 140 grievants.

He further states that following delivery of the said ruling the Claimant/Applicant rightfully preferred an appeal being Civil Appeal No. 589 of 2019 which Appeal remains pending before the Court of Appeal.

The Respondent maintains that the assertion by the Claimant/Applicant that the Court's ruling of 20th December, 2019 does not disclose an

exact figure is false and unfounded as this Court rendered its ruling dated 3rd October, 2020 directing the Deputy Registrar to issue a decree based on the ruling dated 20th December, 2019.

The Respondent further averred that the allegations levelled against this Court are in fact baseless and that the Applicant has not shown any acts of the alleged bias.

It is further the Respondent's contention that the Ruling delivered by this Court on 20th December, 2019 is comprehensively expounded on rationale and is well founded in law contrary to the Applicant's averments.

In conclusion the Respondent argued that the instant Applications have no footing in law and therefore urged this Court to dismiss them with costs.

Parties agreed to dispose of the Applications by way of written Submissions.

Submissions by the Parties

The Applicant in its submissions maintained that it has proved its case for bias as against this Court on the grounds of misconduct in the manner in which it has handled this matter. The Applicant relied on the case of **Kalpana H. Rawal v Judicial Service Commission & 2 Others (2016) eKLR** where the Court held that the onus of proving bias lies on an Applicant.

The Applicant further submitted that it has met the threshold for grant of the orders of recusal that it seeks from this Court and therefore urged this Court to allow its Application in terms of the reliefs sought therein. For emphasis the Applicant relied on the cases of **JGK v FWK HCCC No. 19 of 2017** and **Gladys Boss Shollei v Judicial Service Commission & Another (2018) eKLR**.

In conclusion the Applicant urged this Court to allow its Application as prayed.

Respondent's Submissions

The Respondent on its part maintained that this Court has not shown any bias against the Applicant to warrant its recusal. The Respondent relied on the Court of Appeal decision in the case of **Philip K. Tunoi & Another v Judicial Service Commission & Another (2016) eKLR on the issue of recusal of Judicial Officers**.

The Respondent further submitted that this Court has at all times acted in accordance with the provisions of Rules 5 and 10(1) of the Judicial Service Code of Conduct and Section 5 (1) of the Public Officer Ethics Act, 2003. It further argued that there was no justifiable cause given by the Applicant to warrant my recusal. For emphasis the Respondent relied on the case of **Charity Muthoni Gitabi v Joseph Gichangi Gitabi (2017) eKLR**.

The Respondent contended that this Court having rendered its final Judgment in this matter is in fact *functus officio* and can only await the determination of the Appeals filed in the Court of Appeal.

In conclusion the Respondent urged this Court to find the two applications devoid of merit and to accordingly dismiss them with costs.

In its brief rejoinder the Claimant/Applicant submitted that this Court in its ruling of 20th December, 2019 purported to delegate the quantification of the monetary award to the Deputy Registrar and the Respondent herein in complete disregard to the law despite the fact that the Judgment delivered by Nduma J. did not contain any monetary award.

It maintained that this act by this Court was a clear demonstration of bias on its part and relied on the Court of Appeal decision in the case of **Kenya Revenue Authority v Menginya Salim Murgan (2010) eKLR** where the Court held that quantification of damages is a judicial function that cannot be delegated to the Deputy Registrar.

On the issue of whether this Court is *functus officio* the Applicant submitted that the Applications as filed are not an abuse of the court process as the court is clothed with the requisite jurisdiction to hear and determine the same and is not *functus officio* as argued by the Applicant.

Analysis and Determination

Having considered the Applications, the Affidavits, Submissions and authorities cited by the parties hereto, the issue for determination is whether the applicant has satisfied the threshold for recusal.

Every person is entitled to a fair hearing as envisaged under the provisions of Article 50(1) of the Constitution Article 25 further provides:

Despite any other provision in this constitution, the following rights and fundamental freedoms shall not be limited:

a. ...

b. ...

c. the right to a fair trial; and

d. ...

e.

The Judicial Service Code of Conduct and Ethics made by the Judicial Service Commission pursuant to Section 5(1) of the Public Officer Ethics Act, 2003 contains general rules of conduct and ethics to be observed by judicial officers so as to maintain the integrity and independence of the judicial service. Rule 10(1) of the Code of Conduct requires Judges of the Superior Courts as public officers to carry out their duties in accordance with the law. In carrying out their duties, they are required not to violate the rights and freedoms of any person as protected under the Constitution.

More specifically, Rule 5 of the Code provides that a Judicial Officer is required to disqualify himself or herself in proceedings where his or her impartiality might reasonably be questioned including but not limited to instances in which he or she has a personal bias or prejudice concerning a party or his advocate or personal knowledge of facts in the proceedings before him. These rules are intended to ensure maintenance by Judicial Officers of integrity and independence of the Judicial Service.

The House of Lords held in **R v Gough [1993] AC 646** that the test to be applied in all cases of apparent bias was the same, whether being applied by the Judge during the trial or by the Court of Appeal when considering the matter on appeal, namely whether in all the circumstances of the case, there appeared to be a real danger of bias, concerning the member of the tribunal in question so that justice required that the decision should not stand.

The test in **R v Gough (Supra)** was subsequently adjusted by the House of Lords in **Porter v Magill (2002) 1 All ER 465** when the House of Lords opined that the words “*a real danger*” in the test served no useful purpose and accordingly held that: -

“The question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”

Back home these tenets have adopted in the case of **Philip K. Tunoi & Another v Judicial Service Commission & Another (2016) eKLR**.

In determining the existence or otherwise of bias, the test to be applied is that of a fair-minded and informed observer who will adopt a balanced approach and will neither be complacent nor be unduly sensitive or suspicious in determining whether or not there is a real possibility of bias.

The Applicant in this case maintains that this Court has shown open bias in the manner in which it has conducted its matter and specifically makes reference to the proceedings of 22nd October, 2019 in which I dismissed the Applicants Preliminary Objection.

Upon careful perusal of the proceedings of the said date, I note that the Applicant’s Preliminary Objection was based on the fact that the Affidavit filed by the Respondent seeking orders was not supported by any Application.

The Respondent having taken cognisance of the anomaly made an oral Application to withdraw the Affidavit and informed the Court that it had in fact filed a formal Application in its place.

This request was accepted as a result of which the Applicant’s Preliminary Objection was rendered redundant and was marked as withdrawn with no orders as to costs.

The Applicant further contended that this Court is biased by asking parties to file their tabulation for computation of the Judgment delivered by Nduma J. It is clear from the Judgment that my Brother Nduma J. did direct the Applicant at Clause b) as follows:

“The Claimant to compute all terminal benefits due to the dismissed employees, file and pay within 30 days.”

This order was never complied with by the Applicant prompting the Respondent to make a formal Application for computation of dues. This Court then directed parties to prepare and file their respective computations for consideration.

The Claimant/Applicant still failed to comply with this directive and thus the Court proceeded to direct the Respondent in my ruling delivered on 20th December, 2019 to make a formal Application to the Deputy Registrar to issue it with a decree on the amount assessed in terms of its tabulation as adjusted in terms of the ruling.

It is therefore not true that this Court left the computation of the terminal benefits due to the Respondent and Deputy Registrar as contended by the Claimant/Applicant. Even if this were so, this does not amount to bias to warrant my recusal.

I therefore find that the grounds upon which the application is based do not satisfy the test in the **Porter v Magill case (Supra)** as the Applicant has failed to avail any evidence of circumstances that would compromise my impartiality to handle this matter conclusively. The only ground cited, being that I have dismissed several of the applications it has filed, is not a ground for a recusal. In fact, there are several rulings by Judges other than myself, in which the Applicant was specifically found to have abused the process of this court and its applications dismissed. The applications by the Applicant were dismissed in two rulings dated 16th February 2018 by my Brother Radido J. and the other one dated 24th January 2019 by my Sister Wasilwa J. The instant ruling is the 6th Ruling in this matter excluding the one on

taxation and preliminary objection. It is evident from the record on the file that all the applications filed by the Applicant have been made with the intention to delay execution in this file.

I therefore find that the Applications filed by the Claimant/Applicant seeking my recusal lack merit and are therefore dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF MARCH 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this+ court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE