



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.E467 OF 2020

KEITH WRIGHT.....CLAIMANT

VERSUS

KETEGRA BIOTECHNOLOGY (EPZ) LIMITED.....RESPONDENT

RULING

The respondent, Ketegra Biotechnology (EPZ) Limited filed application dated 30th April, 2021 under the provisions of section 3 of the ELRC Act, Judicial Service (Code of Conduct and Ethics) Regulations, Articles 10, 47, 50, 159 of the constitution and the Bangalore Principles of Judicial Conduct and seeking for orders that;

- a) Pending inter- parties hearing of this application, honourable Lady Justice Monica Mbaru be pleased to recuse herself from taking part in this case any further as the presiding judicial officer.*
- b) Pending inter-parties hearing of this application, this honourable court be pleased to vacate the hearing date of 6th May, 2021.*
- c) Pending full and final determination of this application, this honourable court be pleased to place this file before the Principal Judge of the ELRC for reallocation to another Judge other than Hon Lady Justice Monica Mbaru and direct that this case undergoes pre-trial directions.*
- d) This Honourable court be pleased to grant any other orders and/or directions as it may deem fit and just to grant, on such terms as this court may deem fit.*
- e) Costs of this application be awarded to the respondent/applicant.*

The application is supported by the Affidavit of John Kisigwa advocate for the respondent and on the grounds that since 10th December, 2020 the claimant filed an *ex-parte* application seeking to be granted a hearing date on priority basis which as allowed despite this case not undergoing pre-trial directions as required under Rule 15(1) of the ELRC (Procedure) Rules, 2016. The *ex-parte* orders were issued by Justice Mbaru in favour of the claimant without undertaking pre-trial directions contrary to the law and before pleadings closed.

Other grounds are that despite the *ex-parte* orders being issued, the same were not served upon the respondent and the Judge failed to take cognisance of the same on the day of the hearing, 24th March, 2021. In contravention of the *ex-parte* orders Justice Mbaru allowed the claimant to file Supplementary

List and Bundles of documents dated 22nd and 23rd March, 2021 which were served upon the respondent in court on 24th March, 2021 which the Judge allowed without leave. Despite the advocate for the respondent addressing the court on 24th March, 2021 seeking adjournment for non-compliance with Rule 14(10) on introduction of document without leave outside of the 14 days rule this was disregarded and the case allowed to proceed.

The respondent was unable to proceed with cross-examination owing to the manner in which they were ambushed to participate in the hearing on 24th March, 2021 following lack of pre-trials for the suit and introduction of new documents without leave of court on the hearing. The Judge's actions have resulted in outright bias and prejudice against the respondent and as such the integrity, adherence to the rules of natural justice, impartiality and constitutionality of the trial has been brought into grave disrepute.

The matter is scheduled for hearing on 6th May, 2021 and in light of the contraventions by failure of the Judge to recuse herself would continue to prejudice the respondent's right to fair trial and erode the integrity and impartiality of the trial.

In his Supporting Affidavit, Kisigwa avers that he is in the conduct of this matter for the respondent and upon the claimant filing application dated 10th December, 2020 he was issued with ex-parte orders directing that;

- a) Claim be heard on priority basis on 4th February 2021;
- b) The claimant to serve the respondent with a hearing notice;
- c) For (a) above to take effect, pleadings shall close in the next 21 days.

The claimant did not serve the ex-parte application and order as directed and the respondent only discovered the same on the day of the hearing, 24th March, 2021 and the hearing date for 4th February, 2021 was never served.

Kisigwa also avers that by letter dated 8th March, 2021 wrote to the claimant protesting the hearing notice and seeking to have the matter go for pre-trial.

In contravention of the ex-parte orders of 15th December, 2020 the Judge allowed the claimant to file Supplementary Documents and to serve the respondent on 24th March, 2021 during the hearing which was without leave and after close of pleadings. The Judge then allowed the hearing to proceed and owing to the manner of ambush, the respondent was unable to cross-examine the claimant. These actions have resulted in outright bias and prejudice against the respondent and as such the hearing scheduled for 6th May, 2021 should change and the Judge to recuse herself as this would greatly prejudice the respondent's right to fair trial.

In response, the claimant filed the Replying Affidavit of Judith A. Guserwa advocate for the claimant and who avers that on 24th March, 2021 the respondent sought an adjournment of the case and the court issued directions and on the court ruling, the respondent filed an Appeal to the Court of Appeal which declined to grant the prayers seeking stay of the proceedings and the matters set out in the application and Affidavit in support have since been addressed by the Court of Appeal.

There is no justification or credibility in the averments made as the respondent had sought for the hearing date of 6th May, 2021 to present the defence which was granted and to state otherwise is intended to steal a match against the claimant and paint the Judge in bad light and the application should be dismissed with costs.

Both parties made oral submissions.

The respondent filed a list of authorities and cited the following cases, **Phillip K. Tunoi & another v Judicial Service Commission & another [2016] eKLR; Republic v IEBC & 3 others ex parte Wavinya Ndeti {2017} eKLR; Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2013] eKLR; Barnaba Kipsongok Tenai v Republic [2014] eKLR; Attorney General of the Republic of Kenya & Prof. Anyang' Nyong'o & 10 others EACJ application No.5 of 2007; and Mukunya Mugo & another v Elizabeth Mugure Mukunya {2020} eKLR.**

Determination

Upon the hearing of the parties on the instant application on 27th May, 2021 the substantive issues outstanding are whether the file should be placed before the Presiding Judge, Employment and Labour Relations Court for reallocation to another Judge other than Justice Mbaru and direct that this case undergoes pre-trial directions.

The grounds given by the respondent for seeking these orders are that on 15th December, 2020 the Presiding Judge herein issued a hearing date to the claimant for 4th February, 2021 before the matter underwent pre-trial directions as required under Rule 15(1) of the Court Rules. That the ex-parte orders were never served upon the respondent and on 24th March, 2021 the Judge failed to take cognisance of the same. That the Judge allowed the claimant to file Supplementary Documents dated 22nd and 23rd March, 2021 which were served upon the respondent on 24th March, 2021 during the hearing without leave and contrary to Rule 14 and 15 of the Court Rules and hence the Judge is biased and unless there is a recusal there shall be prejudice against the respondent who will be denied fair trial.

At the core of the court objective is to ensure justice to all the parties attending before it. as correctly cited by the respondent, section 3 of the Employment and Labour Relations Court Act, 2011 directs the court in its objective as follows;

3. Principal Objective

- (1) The principal objective of this Act is to enable the Court to facilitate the just, expeditious, efficient and proportionate resolution of disputes governed by this Act.*
- (2) The Court shall in the exercise of its powers under this Act or the interpretation of the rights of individuals and parties, seek to give effect to the principle objective in subsection (1).*
- (3) The parties and their representatives, as the case may be, shall assist the Court to further the principal objective and, to that effect, to participate in the proceedings of the Court and to comply with directions and orders of the Court.** [Emphasis added].*

In this regard, the court is allowed to regulate its proceedings in a manner that just, efficient and with respect to the rights of individuals and parties before it.

The Rules of Procedure such as the ELRC (Procedure) Rules, 2016 are subsidiary to the principal constitutive statute regulating the functions of the Court. Rules of procedure cannot override the law but be complementary thereto.

On the court directions on 15th December, 2020 both parties were directed on the pleadings.

As correctly submitted by the respondent's Advocates, on 15th December, 2020 the court considered the claimant's application dated 10th December, 2020 and directed as follows;

- (a) The claim shall be heard on priority basis on 4th February, 2021;*
- (b) Serve the respondents with a Hearing notice;*

(c) For (a) above to take effect; pleadings shall close in the next 21 days.

The respondent's case is that there was no service of the application and ex-parte orders of 15th December, 2021.

On the hearing date directed for 4th February, 2021 the claimant advocate attended and pleaded that the claimant was based in the United States of America and wished to attend open court and requested for another hearing date. A new hearing date was allocated upon the court directing the matter be heard on priority basis.

On 24th March, 2021 both parties attended and Kingori Advocate for the respondent submitted that a Hearing Notice had been served on 16th February, 2021 to which they wrote a protest letter on the grounds that documents had been served late and there were no pre-trial directions had been issued.

Upon service of the Hearing Notice on 16th February, 2021 Rule 15(1) and Rule 14(10) of the Employment and Labour Relations Court (Procedure) Rules, 2016 relied upon by the respondent allowed the respondent a fair chance to seek to file any record with the court. These Rules are available for use by all parties before the court.

The court issued its directions on the matter and on the subject of hearing. The claimant was heard on his case.

The respondent's advocate, Kingori opted not to cross-examine the witness and applied for adjournment to call the defence which was allowed and a hearing date for 6th May, 2021 was allocated in the presence of both parties.

The court having rendered itself, to go back on the justification for the directions issued would be to address a matter addressed with finality and act contrary to the principle objective and fair hearing.

The respondent has since filed **Appeal, Civil Appeal No.E111 of 2021 – Kentegra Biotechnology EPZ Ltd v Keith Wright** seeking stay of proceedings herein and which was not allowed. To therefore seek for recusal of the Judge taking account of these facts would be to act in bad faith and without any iota of justification.

The court is alleged to be biased in allowing an ex-parte application dated 10th December, 2020 by allocating a hearing date before pre-trial directions. That there is bias on the part of the Judge for allowing the claimant to file Supplementary Documents without leave and denying the respondent fair trial.

On the court proceedings on 15th December, 2020 the court issued directions with regard to the pleadings and on 24th March, 2021 a detailed ruling and directions of the court addressed the subject of the Hearing Notice for 24th March, 2021 and the filing of Supplementary Documents by the claimant. On the ruling and directions, the court stands *functus officio*.

To infer that this was done in bias is tantamount to a challenge on the ruling and directions. As noted above, the respondent has exercised its right of appeal which is lawful and in consonance with section 17 of the Employment and Labour Relations Court Act, 2011. To go back on the issued ruling and directions would be to invite the court to justify itself in the same, contrary to the rule of law and procedure. Such would be misconduct.

Noteworthy, the respondent fails to set out what matter they wished to be addressed during pre-trial pursuant to Rule 14(10) or Rule 15(1). The subject hearing date for 6th May, 2021 and the subsequent date on 21st May, 2021 were both proposed by the respondent's advocate, Kingori and accepted by the claimant and endorsed by the court.

The court indulged the respondent in these instances. The hearing dates allocated were at the instance of the respondent.

The court of appeal in **Kalpana H. Rawal v Judicial Service Commission and 2 others (2016)EKLR (Nairobi court of appeal and cited in the holding by the East Africa court of justice in AG of Kenya v Anyang Nyong'o Appeal No.5 , Ref No. 1 of 2006** set out the test for bias as follows;

we think the objective test of reasonable apprehension "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 litigant who seeks the recusal 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 about the circumstance of the case.

From the above decision it is clear that there must be a reasonable ground for assuming the possibility of bias and whether it is likely to produce in the mind of right thinking, well informed and reasonable member of the public reasonable doubt about the fairness of the administration of justice

In the case of **Kaplana H. Rawal v Judicial Service Commission & 2 others [2016] eKLR** the court held that;

...decisions abound that judges should not recuse themselves on flimsy and baseless allegations. As was stated in Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451, a judge:

"[W]ould be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance."

In the instant case the respondent has alleged bias on the ground that the orders issued on 15th December, 2020 and directions issued on 24th March, 2021 were biased against them when the court record shows otherwise. The directions issued for the hearing and determination of the substantive suit were to allow both parties close pleadings in 21 days and hearing has since commenced with the participation of the respondent.

Having looked at the existing jurisprudence and the affidavits on record, I find that the instant application does not meet the reasonable test and thus the facts do not establish the alleged bias nor form the same. **The supreme Court in Gladys Boss Sholei v JSC and Another (2018)EKLR** cited with Authority the case of **Simonson v General Motor Corporation USD 425 RSupp574,578(1978)** that;

Recusal and reassignment is not a matter to be lightly undertaken by a Distinct Judge, while in proper cases, we have a duty to recuse ourselves, in case such as the one before us, we have concomitant obligation not to recuse ourselves; absent valid reasons for recusal their remains what has been termed as a "duty to sit".

*From the above it is clear that the requirements of independence and impartiality of judge must be counterbalanced by the judge's duty to sit where no grounds of disqualification exists in fact or in law as the duty in itself helps to protect the independence of our courts against manoeuvring by parties hoping to improve their chances of having a matter determined by a particular Judge as to gain forensic and strategic advantage through delay and interpretation of proceedings as was pointed by the supreme court in the holding by the **Newzeland court of appeal in Mnir-versus-Commissioner of Inland Revenue(2007)3NZLR 495.***

From the above and considering the facts of the application before me I find that the allegation of bias is unsubstantiated and is tantamount to wanting to stop this court from the conduct of judicial

function and I consequently dismiss the same with costs.

Delivered in court at Nairobi this 21st day of June, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi