



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. E421 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

CHARLES JOHN MACHARIA MBUTHIA

CLAIMANT

VERSUS

STANDARD CHARTERED BANK KENYA LIMITED

RESPONDENT

RULING

1. Before me is the Claimant/Applicant's Notice of Motion dated 29th January, 2021 (**the Application**) seeking my recusal from hearing this suit. It is brought under the provisions of Articles 50(1) and 25(c) of the Constitution of Kenya, 2010, Rule 5 and 10(1) of the Judicial Service Code of Conduct and Ethics and all other enabling provisions of the law.
2. The premise of the Application is that the Claimant is apprehensive that his claim will not be subjected to a fair hearing before me. The grounds put forth in the Application are that I had a personal relationship with the late Harrison Okeche. The Claimant avers that the said Harrison Okeche was formerly the Respondent's Head of Employee Relations and presided over the Claimant's unfair dismissal on 31st December, 2019 which was subsequently overturned by the Respondent's internal mechanisms.
3. The Claimant avers that there is a myriad of aggravated offences that were meted out against him by the Respondent through the late Harrison Okeche. It is thus his belief that the matter was assigned to this Court to protect the reputation of the late Harrison Okeche.
4. The Claimant filed a Supporting Affidavit sworn on 29th January, 2021 wherein he cites that there is a "*triangular interconnectedness*" [sic] between myself, the Respondent's Counsel, Geoffrey Obura and the late Harrison Okeche. The crux of the Claimant's contentions are based on the facts that:-
 - i. The late Harrison Okeche and I having worked together at the Federation of Kenya Employers (FKE).
 - ii. A Facebook post published by the Law Society of Kenya on 11th May 2016 with respect to a CPD Seminar where the late Mr. Okeche, Counsel for the Respondent, Mr. Obura and myself made presentations.
 - iii. Gazette Notice No. 5464 dated 14th August, 2002 where Counsel for the Respondent, Mr. Obura and myself were appointed as members of a taskforce to review labour laws.
 - iv. Special issue Gazette Notice 2647 of 13th March, 2009 where Mr. Obura, Counsel for the Respondent and myself were appointed to the Rules Board of the Industrial Court.
 - v. My attendance to the funeral of the late Harrison Okeche where a section of the management of the Respondent was also in attendance and making a tribute at the said funeral.
5. According to the Claimant, the Counsel for the Respondent and myself would go to no end to 'protect the reputation' of the late Harrison Okeche.
6. The Respondent opposed the application by way of a Replying Affidavit sworn by **GEOFFREY ORAO OBURA**, the Respondent's Advocate on 19th February, 2021. The Respondent's opposition is that the Application for my recusal is an attempt at forum shopping. That, any actions undertaken by the Late Harrison Okeche on behalf of the Respondent were done in his professional capacity and not his personal

capacity.

7. By consent of the parties before this Court on 5th February, 2021, parties agreed to dispose of the Application by way of written submissions. The Claimant/Applicant filed written submissions dated 8th April, 2021. The record shows that on 19th May, 2021, the Respondent informed the Court that it opted to rely on the Replying Affidavit sworn on 19th February, 2021 and did not file any submissions.

Determination

8. I have carefully considered the instant Application, the response by the Respondent and the submissions filed by the Claimant. The substantive issue for my determination is whether the Claimant has established a case to warrant the grant of Orders in his application for my recusal.

9. The Claimant has submitted on the legal principles with respect to recusal of a Judge. The Claimant submitted that whereas this Court is obliged to determine the subject matter, the perception of justice is however paramount as it is the same that makes decisions palatable. He submitted that it was the responsibility of this Court to manage the perception of justice and refer the present suit to a different Judge.

10. In support of his submissions, he relied on the decision of

the Supreme Court in the case of **Jasbar Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others [2013] eKLR** where it was held thus: -

*Recusal, as a general principle, has been much practised in the history of the East African judiciaries, even though its ethical dimensions have not always been taken into account. The term is thus defined in **Black's Law Dictionary, 8th ed. (2004) [p.1303]:***

a. "Removal of oneself as judge or policy maker in a particular matter, [especially] because of a conflict of interest."

From this definition, it is evident that the circumstances calling for recusal, for a Judge, are by no means cast in stone. Perception of fairness, of conviction, of moral authority to hear the matter, is the proper test of whether or not the non-participation of the judicial officer is called for. The object in view, in the recusal of a judicial officer, is that justice as between the parties be uncompromised; that the due process of law be realized and be seen to have had its role; that the profile of the rule of law in the matter in question, be seen to have remained uncompromised."

11. The Claimant has also cited at length the holding by the Constitutional Court of South Africa in the case of **Republic of South Africa v The South African Rugby Football Union & Others Case CCT 16/98**. The Claimant relied on this case in support of his submission that the cornerstone of any fair and just legal system is the impartial adjudication of disputes. He submits that despite the high threshold for a successful allegation of perceived judicial bias, he has met the threshold in the form of the evidence produced in the Supporting Affidavit to the Application.

12. It is the Claimant's contention that based on the said evidence, my private life has been intertwined with that of the Respondent's key personnel who make decisions on behalf of the Respondent.

13. **The Judicial Service (Code of Conduct and Ethics) Regulations, 2020 (the Code)** have indicted in statute the circumstances warranting recusal of a Judge which had long been based on judicial precedents. Specifically, **Regulation 21(1)** of the Code provides as follows: -

(1) A judge may recuse himself or herself in any proceedings in which his or her impartiality might reasonably be questioned where the Judge—

(a) is a party to the proceedings;

(b) was, or is a material witness in the matter in controversy;

(c) has personal knowledge of disputed evidentiary facts concerning the proceedings;

(d) has actual bias or prejudice concerning a party;

(e) has a personal interest or is in a relationship with a person who has a personal interest in the outcome of the matter;

(f) had previously acted as a counsel for a party in the same matter;

(g) is precluded from hearing the matter on account of any other sufficient reason; or

(h) or a member of the judge's family has economic or other interest in the outcome of the matter in question.

14. For the purposes of record, I am not a party to these proceedings, nor have I acted as a counsel for any of the parties in this matter. I am not a material witness in the suit and do not have any knowledge of its material or evidentiary facts. I do not have any bias or prejudice against any of the parties and neither myself nor any members of my family or person I am closely associated with have an interest in the outcome of this suit.

15. The Claimant has alleged that I may be biased and attempted to establish the nexus of the bias based on my having worked at the same company as the Late Harrison Okeche. It is true that I worked at FKE with the Late Harrison Okeche and that I attended his funeral and burial after his passing. I also do not deny that I attended a CPD seminar in Kisumu where Mr. Okeche and Counsel for the Respondent, Mr. Obura were also resource persons. It may also be that the Management of the Respondent spoke at the funeral of the Late Harrison Okeche. It is also not denied that Counsel for the Respondent Mr. Obura and I were appointed to two taskforces as cited at various times more than 15 years ago.

16. As a Judge of this Court and the Principal Judge at that, I took an Oath to diligently serve the people and the Republic of Kenya and to impartially do justice in accordance with the Constitution and the laws and customs of the Republic, without any fear, favour, bias, affection, ill-will, prejudice or any political, religious or other influence. I also swore that in the exercise of the judicial functions entrusted to me, I would at all times protect, administer and defend the Constitution with a view to upholding the dignity and the respect for the judiciary and the judicial system in Kenya and promoting fairness, independence, competence and integrity within it.

17. As rightly stated by my brother Odunga J. in the case of **Republic v Independent Electoral and Boundaries Commission & 3 Others Exparte Wavinya Ndeti [2017] eKLR** as cited by the Applicant, we, Judges are made of flesh and bones. We are not created in a lab and incubated until our rise to the bench. We were all members of the bar and have studied, practiced, trained and worked with others and more often other members of the Bar. If every Judge were to recuse themselves from matters where they are acquainted with an Advocate appearing before them or even worked with or for them, then we would see no end to recusals. The overriding objective of the Court to facilitate the just, expeditious, efficient and proportionate resolution of disputes pursuant to **Article 159** of the Constitution and reiterated in **Section 3** of the Employment and Labour Relations Court Act would be rendered academic.

18. In an instance such as the present case, the allegation of apprehension of bias relates to a deceased person who was a former colleague and who was a former employee of the Respondent long before this suit was filed. The prayers are not seeking any orders against the deceased and no relief would flow from any finding of the Court that would be beneficial to either myself or the deceased.

19. It must be said that there are several matters that have been determined by this Court against the Respondent Bank even in the lifetime of the deceased and certainly many that have been decided by myself against clients represented by Mr. Obura.

20. The Court of Appeal minded in their consideration of such a case aptly captured in the case **Kaplan & Stratton v Z. Engineering Construction Ltd & 2 Others [2000] KLR**, the following:

“If disqualification issues were to be raised, say, because a Judge and a member of the Bar belong to the same Rotary Club or the same Lions Club or the same Sports Club, there could be no end to such applications. When a member of the Bar is elevated to the bench his oath of office tells him enough to do what is right. Judges are human beings. They have their predilections and prejudices. They are a complex of instincts, which make the man. For instance, therefore, it is no ground to seek disqualification by saying that the Judge does not like a particular member of the Bar. The converse is also true.”

21. It is not unusual for a litigant to be apprehensive of the outcome of its case. The aspect of probable bias must however be proved. Indeed, the Applicant has submitted that I assigned myself this file as their proof of my probable bias.

22. The Court’s record shows that the Claimant filed suit on 24th August, 2020 vide a memorandum of claim dated 13th August, 2020. Contemporaneously with the Memorandum of Claim, the Claimant filed a Notice of Motion under Certificate of Urgency seeking injunctive orders against the Respondent. The Notice of Motion under Certificate of Urgency was placed before me on 2nd September, 2020 being the Duty Judge. On that day, I directed that the application be served upon the Respondent and for the Registry to set down the matter for hearing on priority basis. The record shows that the Registry set the application for hearing on 6th October, 2020.

23. On 17th September, 2020, the Claimant filed another Notice of Motion dated 14th September, 2020 seeking injunctive orders to restrain the Respondent from declaring the Claimant redundant. As it was filed under a Certificate of Urgency, the application was placed before Makau J. on 17th September, 2020. He certified the application as urgent and fixed it for hearing on the allocated 6th October, 2020. He did not grant any interim orders to the Applicant.

24. The file was placed before Radido J. on 6th October, 2020 where directions were given for the filing of a response by the Respondent. The Judge further directed that the file be placed before me on 9th November 2020 as the Principal Judge for assigning to a Judge for hearing. This was for the reason that both he and Makau J. were scheduled for transfer.

25. On the said date, when the parties appeared before me where Mr. Wathome was holding brief for Mr. Kazungu for the Claimant and Mr. Mbeche appeared holding brief for Mr. Obura for the Respondent. Mr. Wathome addressed the Court on the purpose of the mention as confirming the filing of submissions with respect to the injunction application. The parties confirmed they had filed their respective sets of submissions and asked for a ruling date. The matter was scheduled for Ruling on 5th February, 2021.

26. None of the parties requested for the file to be assigned to a different Judge or even mentioned for that matter that the matter was scheduled for assignment to a Judge.

27. As stated above, the Judges previously handling the matter were scheduled for transfer. Noting that the matter was of an urgent nature, I proceeded to treat it as such to ensure its expeditious disposal. In the handling of the file as at 6th October, 2020 I had not perused the bundle of documents constituting the Claimant’s history with the Respondent and was not aware that the late Harrison Okeche had handled the file in his professional capacity.

28. At the time the file was before me, I was concerned that the determination of the Claimant's Application which sought various restraining orders against the Respondent should be determined expeditiously.

29. It behoves this Court to state that there was no time before the present Application was placed before me that the Claimant raised any issue over his apprehension to my handling of the matter. Had the Claimant done so, I would have addressed the apprehension at that point. I only learnt of the apprehension when the present application for my recusal was brought before me.

30. It is my considered opinion, with utmost respect, that the averments that this Court allocated itself this matter is demeaning to the integrity of the Court and certainly not made in good faith.

31. There is no step that this Court has taken to display any form

of bias or probable bias. I associate myself with the sentiments in the case of: **Nathan Obwana v Robert Bisakaya Wanyera & 2 others (2013) eKLR**, where the Court stated as follows:

“I do find that there has been no proof of bias. The apprehension by the applicant that he will not get justice in this court is a normal apprehension whereby each party who has a matter in court is apprehensive as to the decision the court would make. The court may find in his or her favour and that uncertainty makes parties to be apprehensive. If a party interprets his apprehension and conclude that the court would be biased then that is taking the wrong dimension unless allegations of bias are proved by facts. The aspect of judging encompasses the unpredictability of the decision. If that aspect is missing then parties will be able to make their own predictions and make conclusions as to how the court is likely to decide a matter.”

32. I find that the Claimant has failed to prove the allegations of probable or perceived bias and to establish any of the grounds set out in Regulation 21(1) of **The Judicial Service (Code of Conduct and Ethics) Regulations, 2020** to be applicable to this Court to warrant my recusal.

33. The Claimant's application thus fails and is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF AUGUST 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, the 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 the 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