



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION E116 OF 2021

**IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010 ARTICLES 10,
19(2); 20(1), (2), (3) & (4); 21(1); 23(3); 41; 47 (1) AND (2); 50(1); 258(1); AND 259 (1)**

AND

IN THE MATTER OF: LAW SOCIETY OF KENYA ACT

AND

IN THE MATTER OF: EMPLOYMENT ACT, 2007

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT

AND

IN THE MATTER OF: LAW SOCIETY OF KENYA

BETWEEN

FLORENCE WAIRIMU MUTURI.....PETITIONER

VERSUS

NELSON ANDAYI HAVI.....1ST RESPONDENT

CAROLINE KAMENDE DAUDI.....2ND RESPONDENT

HERINE KABITA.....3RD RESPONDENT

ESTHER ANG'AWA.....4TH RESPONDENT

DR. MAXWELL MIYAWA.....5TH RESPONDENT

JANE ODIYA.....6TH RESPONDENT

GEORGE KAMAU.....7TH RESPONDENT

EMMANUEL KYOBICA.....8TH RESPONDENT

JAMLICK MURIITHI.....9TH RESPONDENT

LEVI MUNYERI.....10TH RESPONDENT
BONBEGI GESICHO.....11TH RESPONDENT
CLARISE MMBONE.....12TH RESPONDENT

AND

COUNCIL OF THE LAW SOCIETY OF KENYA.....1ST INTERESTED PARTY
MERCY KALONDU WAMBUA.....2ND INTERESTED PARTY
GEORGE OMWANSA.....3RD INTERESTED PARTY
CAROLYNE MUTHEU.....4TH INTERESTED PARTY
FAITH ODHIAMBO.....5TH INTERESTED PARTY
ALUSO INGATI.....6TH INTERESTED PARTY
NDINDA KINYILI.....7TH INTERESTED PARTY
BERNHARD NGETICH.....8TH INTERESTED PARTY
BETH MICHOMA.....9th INTERESTED PARTY
RIZIKI EMUKULE.....10th INTERESTED PARTY

RULING

‘A cold coming we had of it,

Just the worst time of the year

For a journey, and such a long journey:

The ways deep and the weather sharp,

The very dead of winter.’

T. S. Eliot’s “Journey of the Magi” (1927)

1. This Petition has that aura about it. It is one of a series of Petitions doings its rounds in the Employment and Labour Relations Court as well as the High Court due to the ongoings at the Law Society of Kenya. The Petitioner sought interim relief subject of the Court’s Ruling on 29th July 2021 in **Florence Wairimu Muturi v Nelson Andayi Havi & 11 Others, Council of the Law Society of Kenya & 9 Others (Interested Parties) [2021] eKLR**. In reaction thereto, the Petitioner filed the motion dated 16th September 2021 seeking to be heard for orders that the Hon. Mr Justice Nzioki Wa Makau does recuse or disqualify himself from hearing this matter and the matter be forthwith remitted to the Principal judge for reallocation to another judge. She also seeks that costs of this Application be provided for. The Application is premised on the grounds that this Honourable Court heard and determined the application for interim orders and in so doing, dismissed the Petitioner’s application for conservatory orders primarily on the ground that even though a *prima facie* case had been established, damages would be an adequate remedy and that on a balance of convenience, the same tilted against the Petitioner owing to an alleged recruitment for her position. That the Petitioner was extremely aggrieved by the said decision and immediately filed appeal in *Nairobi Court of Appeal Civil Appeal No. E435 of 2021* and an application for conservatory orders under *Nairobi Court of Appeal Civil Application No. E274of 2021* which application has been certified urgent but pending hearing. The Applicant asserts that she strongly feels this Honourable Court erred in numerous ways in the abovementioned decision and is biased in respect of the subject matter of these proceedings. The Petitioner asserts that having made preliminary findings including the aspect of damages being adequate, it is unlikely that this Honourable Court will change his position at the substantive hearing of the Petition. Further, that the Applicant’s apprehension of this Court being biased is also informed by the fact that at around the same period, this court faced with a similar question regarding the purported dismissal of her senior Mercy Wambua and the Applicant’s colleague Mary Kitonga, found in favour of preserving their positions and issued interim orders to that effect. It is the Applicant’s assertion that for the purpose of allowing justice to be done and to be seen as if it will be done, it will only be fair for the Hon. Mr Justice Nzioki Wa Makau to recuse himself from further conduct of this matter. The Petitioner/Applicant filed a Supporting Affidavit wherein she reiterates the grounds of the application and avers that she feels the Honourable Judge misunderstood the nature of her case and the surrounding facts and thus ended up making a wrong decision and that the scenario is likely to be replicated at the main hearing in the event he proceeds to preside over the main hearing. The Respondents opted to not file a response while the Interested Parties expressed they were not opposed to the application.

2. The application was disposed of by way of written submissions. The Petitioner/Applicant submits that the law regarding the recusal or disqualification of a judicial officer from a matter has constitutional, statutory, judicial and even moral underpinnings. That it is a fundamental right of every citizen to be entitled to a fair hearing before an impartial body under Article 50(1) of the Constitution. The Petitioner submits that Section 3 of the Judicial Service Act is clear that one of the main purposes of the Act is to facilitate a Judiciary that is *inter alia*, impartial whereas the Judicial Service (Code of Conduct and Ethics) Regulations 2020 made under the said Act requires Judges to carry out their functions objectively, with impartiality and without bias. She submits that Regulation 21 (d) and (e) of the Judicial Service (Code of Conduct and Ethics) Regulations 2020 provides that a Judge may recuse themselves in proceedings where their impartiality might reasonably be questioned due to actual bias or prejudice concerning a party or on account of any other sufficient reason. The Petitioner/Applicant further refers to Value 2.5 of The Bangalore Principles of Judicial Conduct which provides that a Judge is required to disqualify themselves from participating in any proceedings in which they are unable to decide the matter impartially or in which it may appear to a reasonable observer that the Judge is unable to decide the matter impartially. The Petitioner submits that according to the said Bangalore Principles, bias is defined as follows:

“Bias or prejudice has been defined as a leaning, inclination, bent or predisposition towards one said or another or a particular result. In its application to judicial proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind, an attitude or point of view, which sways or colours judgement and renders a judge unable to exercise his or her functions impartially in a particular case.”

3. The Applicant also refers the Court to the Supreme Court case of **Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others [2013] eKLR** wherein the Court while citing various cases including **R vs Gough [1993] 2 All ER 724, [1993] AC 646**, held that the rationale for recusal of judges “is to preserve public confidence in the administration of justice from any suspicion of the impartiality”. That the Supreme Court further added that the objective 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. That on the test applicable, the Supreme Court cited the findings of Lord Justice Edmund Davis in **Metropolitan Properties Co. (FGC) Ltd. vs Lannon [1969] 1 QB 577** and Acker LJ in **R vs Liverpool City Justices, ex parte Topping [1983] 1 WLR 119** where the test was laid out to be whether a reasonable and fair-minded man sitting in Court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible; if the answer is in the affirmative, disqualification will be inevitable.

4. The Petitioner further submits that an Application for recusal of a Judge is a necessary evil as held in the Court of Appeal case of **Kaplana H. Rawal v Judicial Service Commission & 2 Others [2016] eKLR**. That it questions the fairness of a Judge who has been sworn to do justice impartially, in accordance to the Constitution without any fear, favour, bias, affection, ill-will, prejudice and failure to make such an Application in such circumstances risks violating the cardinal guarantee of the Constitution of the right to fair trial. That the Court of Appeal in the **Kaplana H. Rawal** case further noted that a Judge must recuse himself once actual bias is established on his part. The Petitioner submits that in the case of **Swing Limited v Attorney-General (Sued on Behalf of Kenya Meteorological Department & 2 Others [2021] eKLR**, Okong’o J. in recusing himself held that the threshold for a successful allegation of perceived judicial bias is high because courts have recognised there is a presumption that judges will carry out their oath of office but noted that the presumption can be displaced with cogent evidence that demonstrates that something the judge has done gives rise to apprehension of bias. The Petitioner submitted that in **Mike Sonko Mbuvi Gideon Kioko v Director of Public Prosecutions & 5 Others; Council of Governors & 2 Others (Interested Parties) [2020] eKLR**, Onyiego J. stated:-

“...the act of recusal is not a matter of course but a decision based on a factual foundation and personal conscience. It is meant and intended to build and promote integrity and bestow confidence to the public or litigants in the legal or judicial process. Where impartiality of a court is in doubt even in the remotest sense, the honourable thing for that court to do is to step down and have another Judge deal with the matter.”

5. The Petitioner also relies on the case of **Rishad Hamid Ahmed & Another v Independent Electoral and Boundaries Commission [2016] eKLR** where Chitembwe J. faced with a situation where he had made previous adverse findings on a subject stated, “As Judges, we should be ready and willing to recuse ourselves wherever a party feels that the judicial officer has a pre-determined opinion on a specific legal/issue” and proceeded to recuse himself from hearing the petition. The Petitioner/Applicant submits that though the grounds of appeal are reasonable, she would want to advance those grounds without fear but fears the Honourable Mr. Justice Nzioki Wa Makau may consider such grounds to be tantamount to an admonition of his findings and a personal affront against him. That the Petitioner/Applicant would thus find greater liberty to not on one hand confront the approach and findings of the Honourable Judge with a myriad of grievances while on the other hand continue seeking justice from the same impugned court on the final hearing. The Petitioner submits that she has laid a legal basis as to why the Hon. Justice Nzioki Wa Makau should recuse himself from the matter. That the courts even in instances where parties have not fully met the criteria for recusal, still proceed to recuse themselves such as in the **Swing Limited** case above; **Thugi River Estate Limited & Another v National Bank of Kenya Limited & 2 Others [2014] eKLR**; **Marriot Africa International Limited v Margaret Nyakinyua Murigu & 3 others; Ukombozi Holdings Ltd (Interested Party) [2021] eKLR** and **Gitobu Imanyara & 3 Others v Attorney General [2012] eKLR**. The Petitioner/Applicant notes that the overriding objective is to do justice to the parties.

6. The recusal application is laughable at best granted the arguments it is hinged on. The Bangalore Principles of Judicial Conduct provide that a Judge is required to disqualify themselves from participating in any proceedings in which they are unable to decide the matter impartially or in which it may appear to a reasonable observer that the Judge is unable to decide the matter impartially (emphasis mine). There is no impartial or reasonable observer who would consider this Court as being biased or unable to decide this matter impartially. The fact that the Petitioner was not successful in obtaining interim relief is not basis for my recusal. The Petitioner it would seem would want to pick the Judge to hear her case in a skewed version of forum shopping. It is my finding that there is no basis that has been laid under the requirements for a recusal of a Judge for this Court to find in favour of the Petitioner/Applicant in the motion before me. As such the application is dismissed with no order as to costs as the Petitioner has failed to surmount the threshold required for a recusal. It is not the first time that a party has opted to seek remedy in the Court of Appeal against my finding and the pending appeal and attendant applications at the Court of Appeal are not an affront to the Court but are the exercise of a party’s right to seek redress at a superior level of the justice ladder and have nothing to do with a personal contest. The Court is not a party and is unaffected by the appeal preferred.

7. Having found there is no basis for my recusal I will direct that the matter be fixed for the hearing of the Petition on invitation at the Registry in the shortest time possible granted that it was filed on 19th January 2021 and should be determined as soon as is possible to bring the Petitioner the relief sought. Noting that this Court has already filled its diary for the year and is unable to accommodate the hearing of this Petition, the Petitioner's petition can be fixed for hearing before any other Judge at the Nairobi ELRC Court this term if dates are available or by this Court in the next term if no dates are available before my brother and sister Judges this term.

It is so ordered.

Dated and delivered at Nairobi this 9th day of November 2021

Nzioki wa Makau

JUDGE