REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION 46 OF 2020

(Application dated 6th May 2020

(Before Hon. Justice Hellen S. Wasilwa on 9th July, 2020)

RICHARD KIPKOECH AIYABEI.....PETITIONER

VERSUS

AGRICULTURAL DEVELOPMENT CORPORATION.....1ST RESPONDENT/APPLICANT

RULING

1. The Respondent/Applicant, Agricultural Development Corporation filed a Notice of Motion application dated 6th May 2020 seeking to be heard for orders that the Hon. Lady Justice H. Wasilwa recuse herself from hearing, presiding or in any way dealing with the suit herein. Further, that the Court file in respect of the cause herein be placed before the Presiding Judge of the Employment and Labour Relations Court Division- Milimani Commercial Court Nairobi, for urgent directions on further proceedings.

2. The Application is premised on the grounds that the Respondent/Applicant has lost all necessary confidence in the Honourable Court and that there is a clear conflict of interest. That on 15/04/2020, it filed an application under Certificate of Urgency seeking to have the ex-parte orders granted on 31st March 2020 set aside but on 29th April 2020, the Learned Judge without regarding/considering its application of 15th April 2020 and the grounds therein, indicated that the said orders ought to be complied with.

3. The Applicant contends that issuance of the said exparte orders is final in nature as it has essentially reinstated the Petitioner as a Managing Director, despite the lapse of his contract, and that such an order should not issue in the interim. That with the order in place, the Applicant has been subjected to suffer injustice and there is nothing left to adjudicate in the main suit and that justice will not be done or seen to be done if the learned Judge continues to deal with the suit herein. That it is only fair and just that the Learned Judge recuses herself from these proceedings to enable an impartial Court hear the matter and so as to guarantee that a fair hearing is accorded to the Applicant.

4. The Applicant also filed a Supporting Affidavit sworn by its Acting Managing Director, Mohamed Bulle who avers that the Honourable Court's failure to consider the provisions under **Section 49(4)** and **Section 50 of the Employment Act, 2007** before issuing the ex-parte orders is a clear impression of a likelihood of bias. That the Learned Judge failed to balance interest of the Petitioner with the interest of the Respondent and that the Applicant expressed its sentiments to the Presiding Judge vide a letter dated 29/04/2020. That he is advised by his advocates that **Rule 17(10) of the Employment and Labour Relations Court (Procedure) Rules 2016** directs Courts not to grant an ex parte order that reinstates into employment an employee whose services have been terminated except in very special circumstances. That the Applicant has not been accorded a right to be heard and that upon hearing both parties on the merits, the Court retains remedial powers of reinstatement, re-engagement and compensation of a Claimant in event the claim succeeds.

5. The Petitioner/Respondent, Richard Kipkoech Aiyabei filed his Grounds of Objection dated 12th May 2020 objecting the application herein on the following grounds:-

1. The Application is frivolous, vexatious and destitute of any ground to be entertained by Court given the orders sought.

2. The Application and the grounds relied thereon is an appeal of the Court's orders of 31/03/2020 disguised as a recusal application.

3. There is no bias or even a remote nexus to a possibility of bias established as per the supporting affidavit or the grounds relied on by the Applicant.

4. The applicant is forum shopping in the disguise for recusal having refused to comply with the Court order purportedly with the support of the executive.

Respondent/Applicant's Submissions

6. The Respondent/Applicant submits that the issue of recusal is a matter of discretion by the Judge concerned and that practice in Courts has seen judges recuse themselves from hearing matters where they feel they may not appear to be fair or where they feel their impartiality would be called into question. That in determining 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 sensitive or suspicious in determining whether or not there is a real possibility of bias'*. It relies on the case of **Justice Kalpana H. Rawal vs. Judicial Service Commission & 2 others [2016] eKLR** where in considering an application for recusal, the Court of Appeal stated:-

> "***An application for recusal of a judge is a necessary evil. On the one hand it calls into question the fairness of a judge who has sworn to do justice impartially, in accordance with the Constitution without any fear, favour, bias, affection, ill-will, prejudice, political, religious, or other influence. In such applications, the impartiality of the judge is called into question and his independence is impugned. On the other hand, the oath of office notwithstanding, the judge is all too human and above all the Constitution does guarantee all litigants the right to a fair hearing by an independent and impartial judge. When reasonable basis for requesting a judge to recuse himself or herself exists, the application has to be made, unpleasant as it may be. That is the lesser of two evils. The alternative is to risk violating a cardinal guarantee of the Constitution, namely the right to fair trial, upon which the entire judicial edifice is built. Allowing a judge who is reasonably suspected of bias to sit in a matter would be in violation of the constitutional guarantee of a trial in an independent and impartial Court…….***
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> ***An application for recusal of a judge in which actual bias is established on the part of the judge hardly poses any difficulties: the judge must, without more, recuse himself. Such is the situation where a judge is a party to the suit or has a direct financial or proprietary interest in the outcome of the case. In that scenario bias is presumed to exist and the judge is automatically disqualified. The challenge however, arises where, like in the present case, the application is founded on appearance of bias attributable to behaviour or conduct of the judge….."***

7. It submits that the Court has demonstrated judicial impartiality by not considering its application to set aside the ex-parte orders which are incapable of implementation, and proceeding to consider the Petitioner's subsequent applications filed thereafter. That on 15/04/2020, the interim orders issued on 31/03/2020 were not extended and which was pointed out by the Respondent/ Applicant's Counsel on 29/04/2020 when the Court ordered that the Orders of 31/03/2020 be extended but gave no directions on the Respondent/Applicant's application to set aside the ex-parte orders. Further, that the observed inconsistencies in the contents of the Court orders such as the matter proceeding by way of mentions and severally omitting to give the true reflection of the proceedings before it, do not reflect an assuring confidence in the hearing of this matter before this Honourable Court. That the Court issued ex-parte orders without considering **Rule 17(10) of the Employment and Labour Relations Court (Procedure) Rules 2016** and that in view of the Applicant's perceptions and the perceptions of the public, the conclusion of a likelihood of bias will be arrived at.

8. The Respondent calls upon this Honourable Court to be guided by the South African case of South ***African Commercial Catering and Allied Workers Union and Others vs Irrin & Johnson Limited Seafoods Division Fish Processing CCT 2/2000 (Constitutional Court of South Africa)***, as quoted in **Juma Kiprono Kandie & 2 Others vs. Communication of Kenya [2015] eKLR** where the learned judges partly expressed themselves as follows:-

> "In Sarfu, this Court formulated the proper approach to recusal as follows- the question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear or the adjudication of the case that is on mind open to persuasion by the evidence and the submission of counsel.
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> The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour and their ability to carry out that oath by reasons of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant person beliefs or predisposition. They must take into account the fact that they have a duty to sit on any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer must not hesitate to recuse herself or himself if there are reasonable grounds on the part of the litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."

9. It is the Respondent's submission that in the interest of justice as provided for in the Constitution of Kenya 2010 and in the spirit that justice must not only be done but be seen to be done, the Court ought to allow the Application herein.

Petitioner/Respondent's Submissions

10. The Petitioner/Respondent submits that Article 49 of the Constitution which the Respondent has relied upon, deals with rights of arrested persons, which is not applicable in the instant case and contends that with regards to Article 50(1) of the Constitution, the Applicant has not mentioned that Hon. Lady Justice Wasilwa was unfair or given proof of any unfairness by the Court. That under **Section 107 of the Evidence Act**, whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. That lack of fairness by a Judge in proceedings is a factual issue that must be proved by the Applicant in the instant application and that it is not the Court to move itself save for clear instances provided for in law.

11. He submits that as at 31/03/2020, his contract had not terminated and hence the Court exercised its jurisdiction under **Rule 28(c) of the Employment and Labour Relations Court Act (Practice Directions) of 2016** in granting the injunction ordered. That a Judge cannot recuse herself because one is aggrieved by the orders made by the said Judge and that the legal principles governing recusal of Judges is

settled in many judicial decisions including **Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others, Petition No. 4 of 2012[2013] eKLR** a supreme Court decision held as binding in many Court decisions including **Republic v Cabinet Secretary for Transport & Infrastructure & 5 others Ex-Parte Kenya Country Bus Owners Association (Thro Paul G. Muthumbi Chairman) Samuel Njuguna Secretary Joseph Kimiri Treasurer & 8 others [2014] eKLR** as follows:-

> "Recusal, as a general principle, has been much practiced 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]: "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."

12. The Petitioner/Respondent submits that a party should not choose which judicial officer should hear and determine their cases as stated in paragraph 37 of the **Republic v Cabinet Secretary for Transport & Infrastructure & 5 others Ex-Parte Kenya Country Bus Owners Association case above.** That applying the standard of the reasonable test set in the case of **Philip Tunoi J & Another vs. Judicial Service Commission & another [2016] eKLR**, no fact presented by the applicant meets a reasonable suspicion of bias or unfairness.

13. He submits that the applicant has not demonstrated that he has any ground to warrant a recusal and that the grounds relied upon, which aren't denied in the applicant's submissions, are meritorious. That since costs are given to the party that succeeds, costs of the application should be borne by the Respondent as the application is not merited.

14. I have considered the averments of both Parties. The Respondent/Applicant's contention is that this Court has shown bias against it and therefore they have lost all faith in this Court's ability to grant them justice in the Main Petition. The Respondents insist that this Court gave exparte orders on 31/3/2020 and declined to hear their own application for setting aside these orders on 15/4/2020.

15. From the record of this file, the Petitioner/Applicants filed their application on 31/3/2020 seeking injunctive reliefs.

16. It is worth noting that the proceedings of the Court proceeded online due to Covid-19 Pandemic. I granted interim orders allowing the Applicant's application restraining the Respondents from interfering with the Petitioner's performance of his duties as Managing Director of the Respondent.

17. I relied on the evidence before me which showed that the Petitioner was still in employment of the Respondent and had pending disciplinary proceedings against him.

18. The Respondent did not adhere to the orders of the Court and on 8/4/2020 the Applicants filed an application for contempt which is still pending before this Court.

19. On 15/4/2020, the Respondents filed an application to set aside the orders of this Court made on 31/2/2010.

20. The application for contempt was heard on 28/4/2010 and a ruling is yet to be delivered.

21. In the meantime, the Applicants filed this application for recusal on 6/5/2020 before I could deliver the ruling on the contempt application. The question then is whether I can recuse myself from these proceedings on account of perceived bias without disposing of the contempt application.

22. I must from the onset indicate that the submission of bias raised by the Respondent is based on the fact that I have not given directions on their pending application to set aside the interim orders.

23. This Court could not have proceeded to give directions on this application suo moto online without being moved by any party and without having the physical file with it. The submission is therefore unfounded. This Court also gave preference to the application for contempt as it was the application filed 1st and was scheduled for hearing.

24. In the face of a contempt application, this Court could not proceed thereafter to give directions on the other applications without disposing of the contempt application or without knowledge that the contempt if at all had been purged. That is what this Court can determine in the contempt application.

25. This Court is of the view that there are no valid reasons presented before it to show bias at this stage. In any case, this Court still has a duty to give justice to all Parties. Before me is a pending application for contempt which alleged contempt was purportedly committed, against the orders issued by Court. It is only this Court that can determine the said contempt application.

26. In **Supreme Court Petition No. 34/2014**, the Supreme Court Judges Maraga, CJ & P. Mwilu, DCJ & VP, Ibrahim, Ojwang & Njoki were faced with a matter of recusal on account of alleged conflict of interest. In declining to allow the application, the SCJJ pronounced themselves as follows:-

> ***"[63] This then begs the question; would this Court have to down its tools merely because the 1st respondent (JSC) may be a party to such cause? The answer must be a resounding no!***

[64] I am of the view that if this Court downed its tools in an Article 168 (8) petition, merely because the 1st respondent is a party to this suit, this would be tantamount the Court abdicating its constitutional duty.

[65] In addition, it would be equivalent to violating both the Judicial Code of Conduct which reveres the oath of office taken by Judges and Section 10(1) of the Public Officers Ethics Act which requires Judges of the Superior Courts as public officers to carry out their duties in accordance with the law…….".

27. I am indeed bound by the reasoning of the Judges of the Supreme Court. I am also alive to the fact that recusal of a Judicial Officer or a Judge from a hearing or matter must be considered carefully and there must be very strong grounds for recusal.

28. In **Shilenje vs The Republic (1980) KLR 132** Trevelyan J held that Courts will always require some very strong grounds for transferring a case from one Judicial Officer to another.

29. I am persuaded that there are no strong grounds to warrant me recusing myself from this matter. The recusal if allowed will lead to a miscarriage of justice especially in view of the ruling pending before me. In the circumstances, I decline to grant orders sought which application can be reconsidered after the delivery of the pending ruling.

30. Costs in the cause.

Dated and delivered in Chambers via zoom this 9th day of July, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Sinana holding brief Anyoka for Petitioner – Present

Njagi for Respondent – Present and

Holding brief for 2nd to 15th Contemnors

Mogire for 1st Contemnor