



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 1431 OF 2011**

**JACKLINE NG'ONGO NYADEJE.....CLAIMANT**

**VERSUS**

**BOARD OF TRUSTEES,**

**KCA UNIVERSITY .....RESPONDENT**

**RULING**

1. The hearing of this Cause was concluded on 20 November 2018 and the Court reserved judgment to 8 February 2019. During the hearing, the Claimant was represented by the firm of Letangule & Co. Advocates.
2. On 19 December 2018 the Claimant, now acting in person filed a motion seeking orders
  1. ...
  2. This Honourable Court be pleased to reopen the hearing of this Claim and judgment scheduled for delivery on 8/2/2019 before Honourable Justice Stephen Radido be vacated.
  3. THIS Honourable Court be pleased to allocate this matter before another Judge other than Hon. Justice Stephen Radido.
  4. THIS Honourable Court do expunge the Respondent's witness evidence of one Patricia Opande forthwith from the record.
  5. This Honourable Court be pleased to grant leave to the Claimant to rely on the Respondent's management accounts 2010 expunged from record as among the Claimant's list of documents on record.
  6. Costs of the application be awarded to the Claimant/Applicant.
3. When the application came up for *inter partes* hearing on 5 February 2019, the Respondent applied to have its replying affidavit and grounds of opposition admitted.
4. The Court declined to admit the replying affidavit and grounds of opposition because they had only been filed that morning while service of the application had been effected upon the Respondent on 20 December 2018.
5. The Court however allowed the Respondent to make oral submissions on legal points.
6. The Court has considered the material and submissions placed before it and identified the substantive issues arising as *recusal of the judge from the proceedings, expunging of evidence already on record and re-admission of expunged records.*

*Expunging evidence already on record*
7. The Claimant sought that the evidence of the Respondent's witness Patricia Opande be expunged from the record on the ground that the said witness did not have a *practicing certificate* as required by section 29(1) of the *Human Resource Management Professional Act, 2012*. A letter from the Executive Director of the Institute of Human Resource Management was filed in support of the assertion.
8. The letter indicated that though the witness was a full and registered member of the Institute, she had not taken out a valid practicing certificate.

9. The Act has not defined *practice* or the parameters within which having a *practicing certificate* would entitle one to practice, very much unlike for example, what is provided for in the Advocates Act, for advocates.

10. The witness who testified on behalf of the Respondent stated that she was the Director, Human Resources and she was testifying based on the records held by the Respondent in respect issues in dispute.

11. In the view of the Court, the witness was testifying as an employer in terms of section 2 of the Employment Act, 2007, and whether she had a *practicing certificate* would be immaterial to the admission of her evidence.

#### *Re-admission of expunged documents*

12. The Claimant also sought the recalling of records/documents which had been expunged from the record.

13. The documents expunged from the record were filed in Court on 18 October 2018 by the Claimant.

14. The documents were expunged from the record on the application of the Respondent's advocate because they were filed and served after the Claimant had concluded, and closed her case.

15. In the view of the Court, it is extremely disingenuous of the Claimant to now cry wolf over the non-admission of documents sought to be introduced after closing her case when she was aware of the existence of the documents all along.

#### *Recusal*

16. The test a party seeking the recusal of a judge should meet is well tested and has been the subject of examination in cases such as *R v Mwalulu & Ors* (2005) eKLR and *Robert Tom Martins Kibisu v Republic* (2018) eKLR.

17. A party should demonstrate that a fair minded and informed observer having considered the facts would conclude that there was a real possibility that the tribunal was biased

18. The Claimant sought the recusal of the judge, and contended that the judge had demonstrated bias during the trial by denying her an opportunity to produce documents she felt were critical to her case.

19. The Claimant also contended that because the Cause had earlier been heard by Nduma J, it should have been heard by that judge to conclusion during the service week.

20. Nduma J was transferred before he could conclude the taking of evidence. During the service week on 17 April 2018, the parties informed the Court that the Cause had not been listed online and the Court directed that the parties appear before Nduma J on the same day.

21. The judge directed that the hearing proceed on 18 April 2018 at 9.30am.

22. However, the file found its way to this Court, when the Respondent informed the Court that it had filed an application for leave to amend the Response.

23. At the same appearance, the advocates told the Court that they had agreed that the application be allowed and that an *Amended Response* be filed before 20 April 2018.

24. The Court adopted the agreement by parties and because of the amendments, the Court directed that the hearing proceed on 9 July 2018 as it would not have been possible to send the file to Nduma J for hearing during the service week, before the amendments were effected.

25. It therefore should not come from the mouth of the Claimant that this Court had an interest in the outcome of the Cause.

26. The Claimant further alleged bias on the ground that the Court had declined to admit some of her documents.

27. The reasons for the order were given and it is not within the province of the Court to reiterate the reasons save to state that production, admission and proof of documents/evidence is prescribed by both law of procedure and evidence and should a party feel documents were not admitted and/or expunged through wrong exercise of discretion, an appropriate challenge should have been mounted instead of seeking for recusal.

28. The Court is of the view that the Claimant has not satisfied the test for recusal.

#### **Conclusion and Orders**

29. The Court finds no merit in the application dated 19 December 2018 and orders it dismissed with costs to the Respondent.

30. Having dealt with the issue which had held the delivery of the judgment, the Court directs the Claimant to file and serve her submissions on or before 20 March 2019 and the Respondent on or before 25 March 2019.

31. Judgment to be delivered on 26 March 2019.

**Delivered, dated and signed in Nairobi on this 15<sup>th</sup> day of March 2019.**

**Radido Stephen**

**Judge**

**Appearances**

Claimant in person

For Respondent Ms. Kanyiri, Federation of Kenya Employers

Court Assistant Lindsey