



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

OF KENYA AT NAIROBI

PETITION NO. 112 OF 2018

IN THE MATTER OF ARTICLE 22 (1)

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL
FREEDOMS UNDER ARTICLES 36 & 41 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF: THE PROCEDURE FOR INSTITUTING COURT PROCEEDING
UNDER PART II OF THE CONSTITUTION OF KENYA (PROTECTION OF
RIGHTS & FUNDAMENTAL RIGHTS & FUNDAMENTAL
FREEDOMS) PRACTICE & PROCUREMENT**

AND

**IN THE MATTER OF: SECTIONS 48 & 49 OF THE LABOUR
RELATIONS ACT NO. 14 OF 2007, LAW OF KENYA**

BETWEEN

KENYA TERTIARY & SCHOOLS

WORKERS UNION (KETASWU).....PETITIONER

AND

THE UNIVERSITY COUNCIL, UNIVERSITY OF NAIROBI..RESPONDENT

(Before Hon. Justice Byram Ongaya on Wednesday 7th November, 2018)

RULING

The Petitioner filed a notice of motion on 16.10.2018 under a certificate of urgency. The matter appeared before Makau J on 16.10.2018. The Judge ordered that the matter be served on the respondent for hearing on 31.10.2018 before any Judge. The Petitioner served on 17.10.2018 and the application was listed before Ongaya J on 31/10/2018. Both parties were present. The court ordered that the replying affidavit be filed by close of 02.11.2018 for hearing of the application on 07.11.2018 at 9.a.m. or for further orders or to record consent. Costs were to be in the cause. On 07.11.2018 the matter was listed before Ongaya J and counsel for the respondent approached the bench and conveyed that he wished to seek recusal of the Judge. The matter was adjourned for consideration at the Chambers. Counsel for the respondent orally applied that the judge should recuse because the respondent has not been given a chance to present the case and in that regard the court appears to violate the Constitution and the Court's rules of procedure. Counsel submitted that he was not comfortable with the Judge handling the matter and the Judge should recuse himself.

Mr. Agura for the petitioner has opposed the oral application. First he submits that it was necessary for Counsel to file a formal application. Second, all steps in the suit including service of the application on 17.10.2018 had been carried out in accordance with the rules and directions by the Court. Further, the petitioner has filed several cases before the Court and litigants should not be allowed to select Judges to listen to the cases. Counsel for the respondent has indicated he would seek recusal of the Judge in cases where one Frank Esevwe has filed separately but it is submitted for petitioner that there would be no ground to prevent the said Esevwe from moving the court as he opts to do. In such circumstances the oral application should not be allowed.

The court has considered the submissions and makes the following findings:

1. This was the 2nd time the suit was listed before Ongaya J. Counsel submits that the case has been fast-tracked. The court finds that under Section 3 of the Employment and Labour Relations Court Act, 2011 the principal objective of the Act is to enable the court to facilitate the just, expeditious and proportionate resolution of disputes governed by the Act. The directions by the Court for expeditious steps in the matter were made in line with that provision and the section requires that litigants to participate in the proceedings before the Court and to comply with directions and orders of the Court. Within that framework and provision, the Court returns that expeditious management of the suit before Court does not amount to denial of a litigant an opportunity to state their respective case. That ground for recusal will therefore fail.
2. It is clear that there would be no established ground for the Judge to recuse in view of the grounds in the oral application. It is also clear that the parties and in particular the petitioner would not be objectionable to being heard by any other Judge of the Court. In the circumstances and without need of recusal, this station enjoys presence of several Judges of the Court and the case may be heard by any other Judge for the comfort of the parties. While making that finding the Court reckons that the ground in the oral application is that counsel for the respondent would not be comfortable and not that his client would be or was not comfortable.

In conclusion the oral application is hereby determined with orders:

1. The matter will proceed before any other Judge other than Ongaya Judge.
2. In view of the petitioner's application, mention before Onyango P.J. on the 15th November, 2018 at 9.00 a.m. for directions on further steps in the cause.
3. Costs for today in the cause.

Signed, dated and delivered in Chambers at Nairobi this 7th day of November, 2018.

BYRAM ONGAYA

JUDGE