



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO. 45 OF 2018

IN THE MATTER OF ARTICLES 2, 3, 10, 22, 23, 41, 47, 73, 74, AND 236 OF THE
CONSTITUTION

IN THE MATTER OF THE BRAND KENYA BOARD ORDER, 2008 (L.N 38 OF 2008)

AND THE EMPLOYMENT ACT, 2007 AND THE RIGHT TO FAIR LABOUR
PRACTICES UNDER ARTICLE 41 OF THE CONSTITUTION

AND

IN THE MATTER OF THE UNLAWFUL REMOVAL FROM THE OFFICE
OF THE CHIEF EXECUTIVE OFFICER, BRAND KENYA BOARD

BETWEEN

MARY MUNYULI LUSEKA.....PETITIONER/RESPONDENT

- VERSUS -

BRAND KENYA BOARD.....RESPONDENT/APPLICANT

-AND-

CABINET SECRETARY, MINISTRY OF INDUSTRY,

TRADE AND CO-OPERATIVES.....INTERESTED PARTY

(Before Hon. Justice Byram Ongaya on Friday 14th December, 2018)

RULING

The petitioner filed the petition together with a notice of motion on 28.05.2018 through Muchoki Kangata Njenga & Company Advocates. The notice of motion was under a certificate of urgency and learned Counsel for the petitioner Mr. Njenga Advocate appeared before the Duty Judge (Ongaya J) on 29.05.2018 and prosecuted the urgent application ex-parte. The Court ordered:

a) That the application is certified urgent to be served by close of 30.05.2018 for *inter partes* hearing or further orders on 05.06.2018 at 9.00am.

b) That pending the *inter partes* hearing of the application or further orders by the Court, the respondent by itself or by its agents is hereby precluded from advertising, recruiting or appointing any other person to the vacancy flowing from the letter Ref. No. BKB/CONF/2016061/VOL.1 dated 15th May, 2018 terminating the applicant's employment.

c) That costs in the cause.

On 05.06.2018 the claimant appeared before Ongaya J and the respondent had by the notice filed on 04.06.2018 appointed Ojiambo & Company Advocates to act in the matter. It was ordered:

a) By consent the interim orders extended till further orders or till hearing of application.

b) The respondent to file the response, documents, witness statements and replying affidavits by 22.06.2017 and the petitioner may file a supplementary affidavit by 29.06.2018.

c) Today's costs in the cause.

d) Hearing of application on 04.07.2018 at 9.00am for 20 minutes. Parties to exchange submissions by then.

On 04.07.2018 the Court considered the submissions by the parties' respective advocates and ordered:

a) Petitioner to serve supplementary affidavit today and further replying affidavit be filed and served by 11.07.2018.

b) Mention on 11.07.2018 9.00am for directions on the petition and the application.

c) Interim orders extended till mention.

On 11.07.2018 the Court considered the submissions by parties' advocates, section 3 of the Employment and Labour Relations Court Act and ordered as follows:

a) The respondent to file and serve the replying affidavit by 27.07.2018.

b) The petitioner to file and serve submissions on the petition by 20.08.2018 and the respondent by 20.09.2018.

c) Interim orders are hereby extended till hearing of the petition.

d) The highlighting of submissions on 15.10.2018 at 9.00am for 30 minutes.

e) Costs in the cause.

It would appear that on 15.10.2018 the matter was not listed before the Judge for the reason that all Judges of the Court were engaged in a service week towards clearance of cases that were more than 5 years old and pending hearing and determination. The matter appears to have been handled by the Hon. Deputy Registrar of the Court, parties' advocates appeared and it was fixed for mention on 19.10.2018 for orders to be made appropriately.

On 19.10.2018 counsel for the petitioner was present and counsel for other parties were absent. Upon listening to counsel present, the Court ordered:

a) The respondent's time for filing and serving submissions extended to 10.11.2018. Hearing notice

be served by petitioner upon respondent and interested party by 23.10.2018 for hearing on 14.11.2018 at 9.00am for 30 minutes.

b) Costs in the cause.

On 24.10.2018 counsel for the respondent appeared before Ongaya J ex-parte in an urgent application dated 12.10.2018 seeking to review directions on hearing of the suit on 14.11.2018 because the respondent wished to give oral evidence at the hearing. The Court ordered that the application be served forthwith that day for inter-partes hearing on 07.11.2018 at 9.00am before Ongaya J.

On 07.11.2018 advocates for the petitioner and the respondent attended Court. Mr. Ojiambo Advocate for the respondent addressed the Court and submitted, **“The application is dated 12.10.2018. Case was listed but missing on online cause list. The case was dealt with in our absence. Give directions on notice of motion dated 12.10.2018. We wish to be heard before case comes up 14.11.2018 for submissions. Motion of 12.10.2018 seeks leave to cross-examine petitioner and call viva voce evidence. They are 7 witnesses. We filed all witness statements except 2 we seek to file and serve.”** Counsel for the petitioner submitted thus, **“We took directions on 11.06.2018 in presence of all parties. Affidavits and submissions were filed as directed. Parties filed the affidavits. Petitioner filed submissions on 15.10.2018. We were to be heard but service week was on. Highlighting of submissions is on 14.11.2018. All issues raised in petition have been deponed to in affidavits by parties. We can highlight submissions. Court can then judge. We were served with witness statements and we responded to in our further affidavit. Pleadings have closed. I will cross examine deponents of affidavits.”** Counsel for the respondent replied that there was contradictory evidence from affidavits. The Court considered the submissions, the justice of the case and the application dated 12.10.2018 was determined with orders:

a) The case is reopened to the extent that the respondent to file and serve 2 further witness statements by 09.11.2018; and the makers of the witness statements and affidavits be examined and cross examined at hearing date as earlier fixed for 14.11.2018 at 9.00am for 2 hours.

b) Costs in the cause.

On 14.11.2018 the parties’ advocates attended Court and Mr. Ojiambo Advocate for the respondent informed the Court that the respondent had filed an application for recusal of Ongaya J. This ruling is with respect to that application.

The application was by the notice of motion filed on 13.11.2018 and dated 13.11.2018 brought under Rule 17(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 and Articles 50 and 159(1) of the Constitution of Kenya. The orders prayed for are as follows:

- 1) That the application be certified urgent and heard exparte in the first instance.
- 2) That the Honourable Justice Byram Ongaya be pleased to disqualify himself from hearing and determination of the dispute between the parties.
- 3) That the Court is pleased to grant leave to the respondent to appeal against the order and directions of the Court made on 07.11.2018.
- 4) That the Court be pleased to stay further proceedings in this suit pending the determination of the intended appeal.
- 5) Costs be provided for.

The application was based on the annexed supporting affidavits of Damaris Ngugi and Aldrin Ojiambo Advocate and on the following grounds:

- a) The respondent has apprehension on reasonable grounds that the learned Judge will not render a fair hearing and determination of the petition because the learned Judge has taken an extremely partisan position in the present proceedings and directions given suggest the Judge is holding brief for the petitioner.
- b) The Judge gave ex-parte orders in favour of the respondent and confirmed them on 11.07.2018 without giving the respondent an opportunity to be heard.
- c) The Judge gave the respondent a short time to cross examine the petitioner and present its 7 witnesses in the allocated time of 2 hours on the hearing date on 14.11.2018.
- d) On 07.11.2018 on the respondent's application seeking time to call witnesses and adduce oral evidence, the learned Judge on the prodding of the petitioner agreed with the petitioner's counsel that the matter needed to be concluded soonest so that the petitioner could return to work, which comments show that the learned Judge has already reached a decision on the case before a hearing was held.
- e) The respondent wishes to appeal against the orders and directions of the Court giving it impossible timelines to prepare and present its case.
- f) The respondent seeks stay of further proceedings to allow it time to lodge the said appeal and unless stay is granted the intended appeal will be rendered nugatory.

The gist of the applicant's case for recusal of the Judge is that in making the directions for the expeditious hearing and determination of the dispute between the parties, the Judge has thereby displayed bias in favour of the petitioner suggesting that the Judge has predetermined the petition.

The petitioner opposed the application by filing her replying affidavit on 20.11.2018. She stated and urged as follows:

- a) She filed her petition and application in the ordinary and normal cause of the business of the Court and on 26.05.2018 she attended Court with her Advocate and it was Ongaya J who was on duty. The insinuation made in the application that the Judge was biased in her favour was therefore speculative, diversionary, and intended to cast negative aspersions against her as a person. On the material date many other urgent applications were before the Judge and she had not chosen to be before the Judge.
- b) She had no relationship of whatever kind with the Judge and she had only seen the Judge in court during the court proceedings.
- c) She was in Court on 11.07.2018 with her advocate and the respondent's advocate was present and the Court after listening to the advocates gave directions for parties to file their affidavits on the substantive petition and submissions were taken and no objection was made on record to that mode of proceeding or subsequent appeal filed against the said directions.
- d) On 15.10.2018 she had attended Court and found that the case had been listed before the deputy registrar. Both parties' advocates attended and the deputy registrar directed parties to appear on 19.10.2018 before the Court seized of the matter that had given the initial hearing date.
- e) On 19.10.2018 the case was listed for mention before Ongaya J on the day's cause list and the case was called out at around 10.00am. Counsel for the respondent was absent. Counsel for the petitioner submitted and the Court fixed the case for hearing and after the hearing notice was served, the respondent filed on 24.10.2018 an application for hearing of witnesses and which was heard and allowed on 07.11.2018.
- f) The petitioner had attended Court and had never heard her advocate saying that her petition

should be heard by this or that Judge so that she can quickly resume work but her advocate has always urged that it is in the interest of justice and fairness that the matter be heard and disposed off expeditiously. That is her position and interest in the matter.

g) The petitioner has no preferred Judge for hearing and determining her petition but also believes that dissatisfaction with directions made by a Court does not constitute an inference of bias in favour of the other party and cannot be a valid basis of an application for recusal of a judicial officer from hearing a particular suit.

Submissions on the application were filed for the parties. The Court has considered the material on record in support and against the application and makes findings as follows:

1) 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 in the present case and indeed other cases that come before the Court for expeditious steps in the matter were made in line with that provision and the section requires the 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 the Court does not amount to denial of a litigant an opportunity to state their respective case and does not amount to bias on the part of the presiding judge. Such directions by the Court are properly within the statutory direction and guidance of the cited section as well as Article 159 of the Constitution and the Court and the litigants are bound accordingly. That ground for recusal, that the Judge made orders and directions for the expeditious hearing of the suit, will fail as unfounded and such ground is in clear inconsistency with the provisions of the section and Article 159 of the Constitution.

2) The Court has revisited the record and the order was that the hearing of the case was to be on 14.11.2018 and 2 hours were allocated for the purpose. There was no order that the time as was allocated would not be varied or extended based on the justice of the case or upon such justifiable reasons as may be urged before the Court and as is the practice in all trial proceedings. The applicant laments that it was given a short time to file two further witness statements but the record is clear that no significant ground had been raised about the difficulty in the filing of the 2 statements when other statements were being filed for the applicant or the difficulty in complying within the allocated time – considering that the matter had been certified urgent, there were interim orders (that should not have persisted for unnecessarily long), the matter had failed to be heard as had been previously scheduled, and within the very crowded and busy court's schedule, the case had been allocated a hearing date on 14.11.2018. The Court finds that if the applicant had a genuine difficulty in complying with the directions or proceeding with the hearing on the scheduled date, it was open to seek a review or further orders, usually on the hearing date as is the practice on the hearing of civil cases. In the opinion of the Court, it would appear that the applicant was not keen to have the dispute expeditiously determined and the Court has found such conduct to be inconsistent with section 3 of the Employment and Labour Relations Court Act and Article 159 of the Constitution. It is unfortunate that in pursuit of the unjustified goal against expeditious hearing of the dispute, the applicant moved to file the present application which the Court finds to lack merit.

3) The applicant prays that leave is granted to appeal against the orders for a hearing that was scheduled for 14.11.2018 and filing of the 2 witness statements as was directed. First the applicant has not established the legal provision that prescribed for need of such leave for otherwise the right to appeal would be as of course and the leave sought superfluous. In particular, section 17 of the Employment and Labour Relations Court Act, 2011 provides that appeals from the Court shall lie to the Court of Appeal against any judgment, award, order or decree issued by the Court in accordance with Article 164(3) of the Constitution. Thus the Court returns that the applicant had and enjoyed the right to appeal and no leave of the Court was required prior to appealing and as was applied for. Second, the date as scheduled for hearing came and went and the alleged injustice

in that regard would be fictitious as the applicant filed the present application, the hearing of the petition as was scheduled thereby frustrated and the Court will not issue orders in vanity in that regard.

4) As submitted for the respondent the Court of Appeal in **Justice Philip K. Tunoi and Another – Versus- The Judicial Service Commission and Another [2016]eKLR**, the test for recusal was stated thus, **“In determining the 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 unduly sensitive or suspicious in determining whether or not there is a real possibility of bias.”** The Court returns that in the present application, the applicant is not happy or is dissatisfied with the orders made by the Judge in the suit. An objective view is that the applicant would be entitled to appeal or to seek a review but that would not constitute a disabling ground or bias to justify recusal of the Judge as currently urged and prayed for.

5) The Court upholds its opinion in the ruling of 11.12.2013 in **Joseph Maina –Versus- Gitonga Kabugi and 3 Others [2013]eKLR** thus, **“The court considers that the judge carries an ethical obligation for recusal if the judge knows the reason to do so. Where no such reason is known or is not established, the court holds that the judge similarly carries an ethical obligation to hear and determine the case at hand. Thus, a judge holds an obligation to hear and determine matters brought before the court until a valid basis for recusal is established and, a judge should not invoke recusal unless a valid reason to do so exists. The court holds that the threshold and compelling obligation for recusal of a judge in an appropriate case in every measure, equals to the threshold and compelling obligation for hearing and determining the case for which the presiding judge is vested with the jurisdiction to decide and in absence of a valid disabling reason against the judge. Thus, in deciding for or against recusal, the presiding judge must carefully balance the thin line separating the two ethical obligations.”** In the present case the Court has found that there was no disabling factor so that the Judge is bound to exercise the jurisdiction to hear the petition.

6) The Judge also knows and is alert that it must guard itself against readily allowing applications for recusal in circumstances whereby an applicant might then end up achieving a design of choosing a Judge the applicant believes would be more favourable to such an applicant. The Court considers that such was not shown to be the design in the instant application but further cautioned itself that such would be a behaviour all litigants must be discouraged from pursuing. The Court has followed the Court of Appeal in **Uhuru Highway Development Ltd-Versus-Central Bank of Kenya and 2 Others, Civil Appeal No. 36 of 1996** thus, **“...Although it is important that justice must be seen to be done, it is equally important that Judicial Officers discharge their duties to sit and do not, by acceding too readily to suggestion of appearance of bias, encourage parties to believe that by seeking the disqualification of Judge, they will have their cases tried by someone thought to be more likely to decide the case in their favour.”**

7) As already stated earlier in this ruling, it could be possible that a party may be dissatisfied with one or other order or direction given by the Court in the proper exercise of the Court’s authority in the judging mechanisms and which dissatisfaction, in the opinion of the Court, would be ventilated in the established judicial procedures of review or appeal. In that perspective, the Court again upholds its opinion in the ruling in **Joseph Maina –Versus- Gitonga Kabugi and 3 Others [2013]eKLR** thus,

“The applicants have alleged bias against the presiding judge because the judge has made findings and orders in the suit one way or the other. Judicial bias is the judge’s bias towards one or more of the parties to a case over which the judge presides and judicial bias is not enough to disqualify a judge from presiding over a case unless the judge’s bias is personal or based on some extra-judicial reason, (See definition of judicial bias in Black’s Law Dictionary, 9th Edition).

Thus, once the court has jurisdiction over the dispute before it, the court is obligated to hear

and conclude the dispute on the basis of the material before the court. If the trial judge considers the material before the court and opines or finds any party before the court is a horrible or a wonderful person, that would be no ground for recusal of the judge. It is the opinion of the court that such are the judgments the judge would be entitled to make in the mechanics of judging to facilitate judging or as part of the judicial decision making process by the court.

Accordingly, the court holds that decisions by a judge in interlocutory proceedings against or for other party (like in the instant case) must be subjected to the very high measure of establishing the judge's deep-rooted prejudice against a party or the subject matter that the judge cannot be trusted to decide fairly. It is not enough for a party, like in the present case, to simply allege that the party is dissatisfied or not happy with interlocutory orders and attribute the same to speculative and unsubstantiated allegations of bias in applying to seek recusal of the presiding judge. It is only where genuine reasons are established to doubt a judge's impartiality that the judge should be required to recuse or may *sua sponte* recuse because the disabling grounds are visibly present. As it has been judicially decided again and again, the test is objective. It is not what rests in the mind of the judge to decide fairly but what a reasonable person with knowledge of all the circumstances and facts of the case will perceive of the judge's capacity to decide the case fairly."

8) Ruminating on the foregoing findings, it should be clearer that there is no established reasonable and justifiable ground for granting the prayer for stay of proceedings as made in the application.

9) In view of the foregoing findings, the Court returns that the application will fail.

The Court has considered that the Christmas recess will commence on or about 20.12.2018 and Ongaya J is scheduled to thereafter proceed on leave to resume duty on or about 04.03.2019. The Court has considered that the present matter has been certified urgent and there are interim orders which should not persist for unreasonably long time. In such circumstances, the parties are directed to appear before the Principal Judge of the Court for directions on the expeditious hearing and determination of the petition before any Judge as will be convenient.

In conclusion the application by the notice of motion dated 13.11.2018 and filed on the same date is hereby determined with orders:

a) The application is dismissed with costs.

b) The parties are invited to fix a convenient mention date before the Principal Judge for directions on the expeditious hearing and determination of the petition before any Judge as will be convenient.

Signed, dated and delivered in court at Nairobi this Friday 14th December, 2018.

BYRAM ONGAYA

JUDGE