REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 170 OF 2016

(Before D. K. N. Marete)

KENYA PLANTATION AND AGRICULTURAL WORKERS UNION.....CLAIMANT

VERSUS

EASTERN PRODUCE (K) LIMITED.....RESPONDENT

RULING

This is an application by way of Notice of Motion dated 13th December, 2016. It seeks the following orders of court;

*1. **THAT** this Application be certified urgent and be heard ex parte in the first instance.*

*2. **THAT** the Honourable Justice Njagi Marete be pleased to recuse himself from having the conduct of this suit or any further proceedings in respect of the suit herein, Industrial Cause 170 of 2016, Kenya Plantation & Agricultural Workers Union v. Eastern Produce Kenya Limited.*

*3. **THAT** the costs of this application be provided for.*

It is grounded as follows;

1. On 9th December 2016, the Honorable Justice Njagi Marete inter alia ordered the setting aside of the summary dismissal of the Claimant's members working for the Respondent ex parte.

2. The said order was made in contravention of Article 50(1) of the Constitution, Section 12 (3) (i) of the Employment and Labour Relations Act and rules of natural justice.

3. From the history of the dispute between the parties and suits filed, there is reasonable perception of bias show by the Hon. Judge against the Applicant in that;

*i. The Employment and Labour Relations Court sitting in Kericho delivered a judgement on 14th November 2016 in **Industrial Cause 128 of 2015 Kenya Plantation and Agricultural Workers Union v Siret tea Company Limited & 2 others** in which it awarded inter alia wage increase of 15%:15% for the years 2014 and 2015 respectively.*

ii. The Respondent/Applicant immediately filed a Notice of Appeal and an application for stay of

execution of the aforementioned Judgement pending the hearing and determination of the appeal of being Civil Application No. Nyr 83 of 2016 (UR No. 61/2016)

iii. On 17th November 2016 the Claimants and the Respondent entered into a consent order staying the execution of the judgement on terms of the Return to Work Formula that the parties had entered into. The Respondent paid to the employees the agreed percentage wage increment of 7%:8% for 2014/2015

iv. On 28th November 2016, the Claimants members having been incited by the Union officials began agitating for the payment of the full increment pursuant to the Judgement of this Hon. Court, disregarding the Orders of the Court of appeal.

v. The Claimant's members further engaged in an unlawful and violent strike that lead to loss of life and massive destruction of the Applicant's property.

vi. On 6th November 2016, the Respondents filed an urgent suit and application to this Honourable Court bringing to courts notice the violent and unlawful strike by the Claimant's members and the orders made by the Court of Appeal. This was suit ELR No. 168 of 2016

vii. The events of the violence and the damage cause were widely reported in the media. The Applicant also provided the Court with photographs and news paper reports which documented the violence and damaged caused.

viii. The Court considered the application and made orders restraining the Claimants from inter alia continuing in any strike and destroying property.

*ix. The Court suo moto made the orders not in the claim it was filed but in **ELR No. 128 of 2015**, in which the Respondent could not claim any orders as the court had already rendered its final judgement. This has led to considerable confusion as to who is the applicant and what is to become of the actual suit.*

i. The Claimant was served with the orders and application on 7th December 2016.

ii. That having already brought to the Courts attention the Union members violent behavior and the massive destruction of the respondent's property, it is inconceivable that a court of law could two days later make orders setting aside and/or lifting any summary dismissal of the Claimant's members without giving the Respondent an opportunity to be heard.

iii. It is quite clear the Respondent's apprehension that it will not be accorded a fair hearing in this suit is well founded.

x. The Court did not treat the Applicant in a fair manner, as the effect of its order is to protect employees who participated in an illegal strike and carried out criminal acts contrary to the provisions of Section 80 of the Labour Relations Act.

4. The Applicant herein has filed an application for contempt at the Court of Appeal in Civil Application No. Nyr 83 of 2016 (UR No. 61/2016 and the same has been served upon the Union.

5. To ensure that the ends of justice are met and justice is seen to be done the Hon. Justice Marete should rescue himself.

6. The Honourable Court being a seat of a justice ought not to act in a manner that would violate, or give the perception of violation and denial of the right of a party to a fair hearing or give the perception that the principle of neutrality is being abused. Justice must not only be done but also be seen to be done.

7. This application is made respectfully with the interests of justice, fairness and equity in mind.

The claimant/Respondent in a Replying Affidavit sworn on 6th February, 2017 opposes the claim and prays that the same be dismissed with costs.

The Respondent/Applicant bases her application on *inter alia*, facts that are expressly brought out on the face of the application. This is also replicated in the Supporting Affidavit to the application sworn by Dennis Kiarie Gitaka on 13th December, 2016. It is not necessary to reproduce these here.

In support of her application, the applicant sought to rely on the authority of **King Woollen Mills Ltd & Another vs Standard Chartered Financial & Another** affirming Lord Denning's decisions' in **Metropolitan Properties Co. Ltd vs Lannon** stated as follows;

> *"In considering whether there was a real likelihood of bias, the court does not look at he mind of the justice or at the mind of the chairman of the tribunal or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would or did, in fact, favour one side at the expense of the other. The court looks at he impression which should be given to other people. Even if he was as impartial as cold be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, the he should not sit. And if he does sit his decision cannot stand. Nevertheless there must appear o be a likelihood of bias. Surmise or conjecture is not enough. There must be circumstances from which a reasonable man would think it likely or probable that the justice or chairman, as the case may be, could, or did, favour one side unfairly at the expense of the other. The court will inquire whether he did, infact favour one side unfairly. Suffice it that reason is plaint enough. Justice must be rooted in confidence: and confidence is destroyed when right minded people to away thinking: "The Judge was biased"*

She further sought to rely on the authority of **Karttunen v. Finland, Communication No. 387/1989, U.N Doc. CCPR/C/46/D/387/1989 (1992)** as follows;

7.2 *The impartiality of the court and the publicity of proceedings are important aspects of the right to a fair trial within the meaning of article 14, paragraph 1. "impartiality" of the court implies that judges must not harbor preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties.*

The Claimant/Respondent in her written submissions dated 25th April, 2017 fault the application for being set on an apprehension of a reasonable perception of bias exhibited by the presiding judge arising out of a sequence of events between the parties and the various suits filed thereof. She narrates these as pleaded by the Respondent/Applicant.

The Claimant/Respondent submits that the issue of irregularity in an earlier application cited by the applicant is a subject matter of review and the applicant should in the first place have made an application for a review of the same. She puts it as follows;

> *On the issue of irregularities in the proceedings of the two suits the Repondent/Applicant has the option to seek a review of the irregularities and therefore they cannot be the influencing factor in the present proceedings. The merits and demerits in the proceedings in those other suits in the granting of interim orders must have been considered and reasons thereof given for the granting of the orders otherwise the court cannot be lynched for declining to grant an order and if that were to be the case, all loosers in the matters brought before court will be seeking the courts to recuse themselves.*

The claimant/Respondent further submits that insofar as the allegation of reinstatement is concerned, the court only made interim orders of reinstatement as follows;

> *1. **THAT** this application be and is hereby certified as urgent and service hereof be dispensed in*

the first instance.

*2. **THAT** pending hearing and determination of this application there be interim orders restraining the Respondent from convening or setting in motion disciplinary process geared towards summary dismissal of the claimants/applicants' members pursuant to an alleged participation in an illegal strike on the related course.*

*3. **THAT** interim orders do issue staying, setting aside and lifting any summary dismissal of the claimant's members working for the Respondent.*

*4. **THAT** this application, orders of court and suit be served onto the Respondent Forthwith but not later than the close of the day on 10th December 2016.*

*5. **THAT** the Respondent be and is hereby awarded five days to make file and serve a response to this application and claim.*

*6. **THAT** hearing interparties on 16th December 2016 at 900 hours.*

These were intended to forestall the disciplinary process and possible dismissal pending hearing of the application and thus the court cannot be faulted on the same.

She seeks to rely on the authority of ***R.vs Bow Street Metropolitan Stipendiary Magistrate and others exparte Pinochet Urgarte (No.2)(1999)1 ALL ER*** where it was observed as follows:

> *… the general principle applicable in the cases of recusal are that; a judge has an interest in the matter before it either as a party or has financial or proprietary interest in the outcome of the case or the judge has conducted himself or herself or behaved in a manner that may give suspicion that he/she is not impartial* ***(see EACJ Application No. 5 of 2007 Attorney General of the Republic of Kenya and Prof. Anyang Nyongo & 10 others***
>
> *In this matter the Honourable Judge is neither a party nor do he have any financial or proprietary interest in the outcome of the case. He has neither conducted nor behaved in a manner that gives suspicion that he is not impartial. It is our submissions that the application is baseless and unfounded.*

She also emphasized the reverse side of the authority of **King Wollen Mills Ltd & Another vs Standard Financial & Another (1994) LLR 3910** where it was observed that;

> *"a judge should only disqualify himself if, and there was none, a real likelihood of bias existed, Mere suspicion of a whimsical, capricious and unreasonable person was not enough to justify a judge disqualifying himself."*

Further, in the American case of **Perry vs Schwarzenegger, 617 F. 3D 1052 (9TH CIRC, February 7, 2012**, it was held that the test for establishing a judge's impartiality is the perception of a reasonable person, this being a *"well-informed, thoughtful observer who understands all the facts, and has examined the record and the law and thus unsubstantiated suspicion of personal bias or prejudice will not suffice."*

In denying a case of apparent bias in the circumstances of this case, the Claimant/Applicant in reliance on the authority of **Barnaba Kipsongok Tenai vs Republic (2014)eKLR** submits as follows;

> *…all the court can do is to carefully examine the facts which are alleged to show bias and from those facts draw an inference, as any reasonable and fair minded person would do, that the judge is biased or is likely to be biased. Sight must not be lost of the fact that losing litigants might be more inclined to explain their loss on the alleged wickedness of other people rather than on the weakness of their own case. It is these considerations that have led to the restraint that judges ought not be too ready to disqualify themselves lest there be no judge available to deal with*

certain types of cases, such as this one where parties are constantly in the courts over one sort of dispute or another.

This is an interesting scenario. It would appear that after a series of matters before court and the outcomes thereof the Respondent/Applicants now feel frustrated and are seeking a way out by way out of an application for recusal. As observed in the various authorities cited by both parties, recusal is pegged on the basis of a perception of bias by a reasonable person who is in the know of the facts bellying the case and capable of knowing and weighing on a steady scale the likelihood or otherwise of bias by a judicial or quasi judicial officer. It is not anything to the contrary.

The elaborate application of the Respondent/Applicant seems largely based on their experiences in court on this and other matters. Nasty experiences? I do not know.

The submissions on reinstatement are with due respect as unfortunate as they are unfounded like submitted by the Claimant/Respondent. This court issued interim orders intended at maintaining a *status quo* pending hearing and determination of the application at hand. The allegation is therefore a falsehood. No case, credible or otherwise, would be founded as falsehood, concoction or fantasy.

The issue of the numbering of causes that cause No. 128/2015 and 168/2016 is an administrative matter that should be raised as such. This is a matter for the Deputy Registrar and was managed with the involvement of the applicant. The court is not involved in such non judicial functions and bringing it out in support of this application is a non starter.

The test therefore is one of perception of bias by other people not the judicial officers or even the parties to the suit. This is not demonstrated in the circumstances of this case. Instead, we are faced with the outburst of a disgruntled litigant perhaps went on vexing, cowering or intimidating the court into silence and recusal. This should never be the case.

I am surprised that the applicant's elaborate pleadings and submissions, including the list and bundle of authorities captures the concept and law applicable but chooses to misapply the same. This is because it is clear from the onset that the basis and substance for recusal in the circumstances of this case is laid on quick sad. It is unfounded.

I now, more than ever, acclaim the scientific analogy that matter is indestructible. It merely changes form. This is from solid to liquid to gas or vice versa – no more. It cannot be destroyed. This is the same for the truth, reality and sense.

The criterion for recusal is bias as espoused and perceived by *other people – a reasonable person*. It cannot be whimsical and or left to the dictates of players in court - the judge, judicial officer or even parties to the suit. Who will bell the cat? A price tag herein is exceedingly exaggerated.

I suspect that this application is intended to harangue and provoke the court into silence. It is a display of contempt of this court. This is outright vexation.

I further find the application frivolous, vexatious and an abuse of the process of court. It may as well be intended to annoy. This is also an abuse of the court's resources and should be discouraged at all times.

I am therefore inclined to dismiss this application for want of merit and being an abuse of the process of court. The cost of the application shall be borne by the Respondent/Applicant.

Delivered, dated and signed this 16th day of May 2017.

D. K. Njagi Marete

JUDGE

Appearances

1. Mrs. Kimani instructed by Kaplan & Stratton Advocates for the Respondent/Applicant.

2. Mr. Orina Instructed E.M. Orina & Company Advocates for the Claimant/Respondent.