



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

PETITION NO. 10 OF 2017

PAUL KIPROTICH CHERUIYOT.....PETITIONER

VERSUS

KENYA PORTS AUTHORITY.....RESPONDENT

RULING

INTRODUCTION

1. The application before me is the Notice of Motion dated 29/6/2017. It is brought by the respondent to the suit and it seeks the following orders

- (a) That the honourable Mr. justice Onesmus Makau to recuse himself from further hearing this matter.
- (b) That the consequential directions be given for the hearing and disposal of this matter before another judge of this honourable court.
- (c) That the costs of this application be in the cause.

The grounds upon which the Motion is brought are:

- (a) The Honourable Mr. justice Makau appears to have a preconceived notion about the respondents labour practices which gives rise to the real possibility and likelihood of bias as against the respondent receiving a fair and just hearing,
- (b) The record of proceedings on the court file for the 14th June 2017 fails to clearly capture all the objections and submissions made by Mr. Dan Ondego of Messrs A.B. Patel & Patel, Advocates appearing for the respondent herein;
- (c) The likelihood of bias is manifest from the record showing that this petition was filed on 5th June 2017 and served on the respondent the following day, the respondent's Advocates only came on record on the 13th June 2017 and the fact that the matters raised in the petition and interim application were fairly substantial which required a proper response, the honourable Mr. justice Makau sought to restrict the respondents' right to respond to 5 days without any proper or lawful reason therefor;

(d) The learned Mr. justice O. Makau held that 21 days was a lot of time to responded without clearly appreciating even the court's rules permitted the filling of a response within such time and, when in fact, the court had refused to certify the matter urgent;

(e) The learned Mr. justice Makau made certain remarks which did not record on the court file which appear to suggest that the likelihood of bias as against the respondent is real and cannot be discounted or ignored

2. The Motion is supported by the affidavit sworn by Turasha John Kinyanjui on 29/6/2017. The Motion has not been opposed by the respondent and therefore proceeded exparte on the basis of the supporting affidavit and the list of authorities filed by the applicant on 30/6/2017.

BACKGROUND

3. The petitioner herein brought this suit alongside a Notice of Motion for conservatory orders to redeploy the petitioner to the legal department and restrain or prohibit the respondent from withholding or denying him the right to appropriate training and continuous professional development. After considering the Motion when it was brought to my chambers on 6/6/2017, I declined to certify it urgent and directed the applicant to serve the defence for inter partes hearing on 14/6/2017.

4. On the 14/6/2017 Mrs. Nyange appeared for the petitioner while Mr. Ondego held brief for Mr. Kagram for the respondent. Mr. Ondego was not ready to proceed and straight away sought leave of 21 days to file response to the Motion and the petition. The reason for the leave was that he needed the time to get instructions from his client.

5. Mrs. Nyange protested against the request for 21 days leave on ground that her client was suffering after I declined to grant the conservatory orders. Specifically she contended that the petitioner's car pass had expired and he could not access the port after the security department refused to give him another gate pass to access the Container Terminal 2 department where he had been transferred to, and which the security department had alleged that it is not-existent. The counsel sought court order to retransfer the petitioner to HR department for purposes of acquiring a car pass because that was a department known by the security department.

6. Mr. Ondego did not insist on 21 days leave to file response after I arbitrated over the matter and even pointed to him that Mrs. Ikegu, an inhouse counsel for the respondent was inside the court and had matter which had a date for ruling for a similar Motion. I even politely told him that he could possibly ask for her assistance to get the needed instruction to respondent to the Motion and the petitioner so that I do not have to grant the conservatory orders, and instead have the matter mentioned on 21/6/2017 together with other similar petitions involving the same respondent for direction on whether it was possible to abandon the application for conservatory orders in favour of early hearing and disposal of the main petition, because the Motion and the petitions were seeking more or less the same orders.

7. My suggestions pleased both Mr. Ondego and Mrs Nyange and they agreed on a leave of 5 days for the defence to respond to the Motion and the petition and that the matter be mentioned on 21/6/2017 for directions. Mr. Ondego also indicated that the petitioner had not been barred from accessing his work place.

8. The arguments took unnecessarily long time and wasted a lot of time for other matters which were listed that day as I tried to get the parties to agree on the way forward. After the counsel finally agreed, I recorded the order but before I signed it, Mrs. Nyange sought for court order that her client be issued with a car pass to access his work place. I thought that would take us back to the issue of conservatory orders again and I declined the order. Instead I directed the respondent's Head of Security to ensure that the petitioner had access to work place either by issuing a car pass or in any other manner so that the petitioner did not miss work.

9. When I sought for name of the respondent's Head of Security department so as to hold him/her

accountable that is when Mr. Ondego rose to object to the identity of the officer being revealed but the petitioner's counsel had already given me the name of the officer by the time he rose to object. I therefore told him to sit down because the petitioner had not yet been dismissed from work and he had every right to access his work station.

ANALYSIS AND DETERMINATION

10. The issue for determination is whether the applicant in the present Motion has met the threshold for the court to recuse itself from presiding even the proceedings herein. The applicant accuses the court of bias against her but does not say whether I am in favour of the petitioner. The reason for the said accusation is that I failed to record everything that was stated in court by Mr. Ondego advocate on 14/6/2017 and that I denied him 21 days leave to file response to the Motion by the Petitioner.

11. In my view that accusation is not well founded and it is very subjective. The record I penned on that day represents a reasonable and accurate data of the proceedings of that day. It is not possible for the court to record by long hand every word that is uttered in adversarial proceedings. I did my best in the circumstances of this case considering the pressure of work that morning. If I was biased against the applicant, her inhouse counsel Mrs. Ikegu advocate who was in court for a similar matter brought against the applicant would also have accused me of bias in that other matter and possibly sworn an affidavit to support the Motion now before me.

12. Instead the Motion is supported by her fellow in house counsel Mr. Kinyanjui who was not present in court that morning and he is relying on some information from Mr. Ondego Advocate who has not sworn any affidavit. Consequently, I can only observe that the allegation of bias is not valid and the applicant is construing the circumstances of the proceedings under review subjectively which is the wrong test for bias.

13. My reading of the Court of Appeal decisions in CIVIL APPL NO. 224 OF 2006, STANDARD CHATTERED FINANCIAL SERVICES LTD AND ANOTHER –VS- MANCHESTER OUTFITTERS AND 2 OTHERS, cited by the applicant clearly shows that the test for judicial bias is objective test. It is what a reasonable fair minded and informed member of the public sees about the conduct of the proceedings by the judge. Hence the maxim, justice should not only be done but should manifestly be seen to have been done.

14. In this case none of the people in court that day included Mrs. Ikegu an inhouse counsel for the applicant and Mr. Ondego advocate, have sworn that the court was biased or is likely to show bias against the applicant. I therefore find that the Motion herein has failed to meet the threshold for my recusal from this suit. In my view it is likely to be a delaying tactic or a personal vendetta by defence counsel against me as a judge to justify forum seeking. I say so because I have presided over numerous suits brought against the same applicant and so many are still pending before me and I have not heard the respondent or his numerous counsel who represent her, raise any alarm that I have been biased, or I am likely to be biased against her. It is also surprising how quick the counsel managed to get instructions to bring this Motion for recusal yet upto this time I am writing this ruling being 12th day of July 2017 at 11.34pm, the applicant has not yet filed any response to the petition and the petitioner's Motion dated 5/6/2017.

15. In my considered opinion the court should not be battered by counsel for managing the time a case will take in court. All the counsels who appear before me know very that I have been efficient in case management. That is in tune with the vision by the Honourable Chief Justice and the desire by Kenyans under Article 159 of the Constitution to have justice done without due delay.

DISPOSITION

16. For the reason that the applicant has failed to prove that I am biased (or will be biased) against her in this suit, I dismiss the Notice of Motion dated 29/6/2017 with costs.

Dated, signed and delivered this 21st July 2017

O. N. Makau

Judge