



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO 128 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 21st October, 2015)

JUMA KIPRONO KANDIE 1ST CLAIMANT
CHRISTOPHER KEMEI 2ND CLAIMANT
MATANO NDARO 3RD CLAIMANT

VERSUS

COMMUNICATIONS AUTHORITY OF KENYA.....RESPONDENT

RULING

1. The application in court is one dated 29th June 2015, and filed in court on the 30th of June 2015. The same was brought under a Certificate of Urgency by Mohammed & Kinyanjui Advocates and through a Notice of Motion filed under Section 3(1), (2) 7 20 (1) of the Industrial Court Act, 2011 and Rules 16(1) & (2) of the Industrial Court (Procedure) Rules, 2010 and any other enabling provisions of law.

2. The Applicant seeks Orders:

1. ***THAT this matter be certified urgent and be dispensed with in the first instance.***
2. ***THAT the Honourable Lady Justice Hellen Wasilwa be pleased to disqualify herself from any further conduct of this matter.***
3. ***THAT this matter ought to be placed before any other judge in Employment and Labour Relations Division for its just and conclusive determination.***
4. ***THAT this Honourable Court be pleased to stay the Ruling scheduled to be delivered by the Honourable Lady Justice Hellen Wasilwa on the 7th July 2015***
5. ***THAT this Honourable Court be pleased to discharge/set aside all orders issued herein by the Honourable Lady Justice Hellen Wasilwa.***
6. ***THAT costs of this application be in the cause.***

3. It is grounded on the following grounds:

1. **That on the 15th April 2015, the Honourable Lady Justice Wasilwa despite the objections and reservations of the Respondents issued orders enjoining and granting benefit to parties not privy to the instant suit.**
2. **That on the 17th June 2015, the Honourable Judge issued other ex-parte orders in regard to Respondent/Applicant's managerial positions that are not the subject matter of this suit.**
3. **That the Honourable Lady Justice Hellen Wasilwa's has demonstrated, since the onset of this suit, through her several Rulings/Orders, a likelihood of bias against the Respondent/Applicant's case.**
4. **That the Honourable Lady Justice Hellen Wasilwa's Rulings /Orders have consequently created in the mind of the Respondent/Applicant, a reasonable apprehension it may not get fair and impartial trial.**
5. **That the Rulings/Orders by the Honourable Judge have demonstrated a definite bias which the Respondent / Applicant fears have divested the good judge of the requisite mind to adjudicate on the pertinent matters before this Honourable Court.**
6. **That accordingly, if the Honourable Judge continue to preside over this matter, it is highly unlikely that justice will not be done nor seen to be done to the prejudice of the Respondent/Applicant.**
7. **That from the aforesaid, it is apparent that the Honourable Judge is hell bent on the completely halting the operations of the Respondent and that the Respondent should have never come to this court seeking justice.**

And is also supported by the annexed affidavit of Francis Wangusi who is the Director General of the Respondent.

4. The Applicant avers that the Honourable Judge has granted every order filed by the Claimant and despite the objections and reservations of the Respondent Applicant, issued orders enjoining and granting benefits to parties who are not privy to the proceedings and on that basis alone, the Respondents / Applicant feels that they have been treated unfairly and there exists a genuine bias that can only be because of a certain pre-disposed position. The Applicant has attached a copy of the Ruling/ Order marked FW-1).

5. The Applicant further avers that where parties have argued, submitted and have agreed on a date for ruling, other interlocutory applications, leading to ex-parte orders have been granted stopping the Board of Governors in their individual capacities from filling up managerial positions which are not subject matter of the instant suit. The Applicant have attached a copy of the Application marked as FW-2, Interlocutory Application marked FW- 3 as well as Orders granted marked as FW-4 respectively.

6. The Applicants therefore argue that these actions and orders given amount to judicial impunity and the rule of law was not followed and such orders were only designed to cripple the Respondent/Applicant completely.

7. The Applicant as a result feel that they will not get justice in this matter and ask the court to allow this application as it is an objective test. They therefore seek for the Court to rescuse itself and stay of the 2 Rulings.

Respondent Position

8. The Respondents oppose the application. They have relied on a Replying Affidavit sworn by one Juma Kiprono Kandie, the Director/ Human Resource & Administration in the Respondents Company dated 28th July 2015 and filed on the same day.

9. The Respondent argues that the application presented fails to provide any known ground for recusal of a judge.

10. The Claimant/Respondent rely on the case of *Civicon Limited v Kenya Revenue Authority the Commissioner of Customs and another* where the judge in that matter relied on the case of *Attorney General of Kenya v. Peter Anyang Nyong & Others, East African Court of justice Application No 5. Of 2007*, which court stated that;

“There are two categories of scenarios. In the first, where it is established that the judge is a party to the cause or has relevant interest in its subject matter and outcome, the judge is automatically disqualified from hearing the cause...”

“In the second category, where the judge is not a party and does not have relevant interest in the subject matter or outcome of the suit, a judge is only disqualified if there is a likelihood or apprehension of bias arising from such circumstances or relationship with one party or preconceived views on the subject matter in dispute. The disqualification is not presumed like in the case of automatic disqualification. The applicant must establish that bias is not a mere figment of his imagination.”

11. The Respondent then argues that the issuing of Orders against the Applicants does not amount to bias, as loss of an application by party is not an indication of bias or recusal as the court applies its judicial mind and determines a case one way or another depending on the merits of the case... They came to court in February 2015 at the time when their positions were at risk and they stood to lose their jobs and this mandated inclusion of specific prayers, which were not all ex-parte.

12. The Respondent further argues that the Applicants/Claimants ought to have appealed against the Orders rather than resorting to unjustifiably scandalizing and casting un-premised aspersions on the integrity of this Honourable Court.

13. The Respondent states that the Applicants counsel on the 27th of May 2015, filed a Notice of Motion for Review, which was duly heard and determination ruling date set. The Respondents aver that fair opportunity was given to both sides when hearing the review. Moreover, the Applicants defied an order of the court when they went on to conduct interviews for positions of general manager, technical services, General Manager, corporate affairs and General manger support services despite a court order to maintain status quo from this court.

14. They submit that filling up of those positions would fundamentally have altered the status quo and organizational structure of the Respondent which has led to the filing of contempt proceeding against the Applicant. The respondent then argues that the Applicant cannot now come to court casting doubt on its integrity when it blatantly disobeys orders.

15. Having considered the submissions of both parties, the issues for consideration by this court are as follows:

(1) What are the principles of Judicial Impartiality?

(2) Has this court by its acts on omissions gone against the said principles of Judicial Impartiality?

(3) What orders are appropriate in the circumstance?

16. On 1st issue, the doctrine of judicial recusal dictates that the judge must step down where there

appears apparent bias. It is not a matter of discretion. The test to determine apparent bias is this: ***“if a fair minded and informed observers, having considered the facts, would conclude that there was a real possibility that the judge was biased, the judge must recuse himself. That test is to be applied having regard to all the circumstances of the case”***.

17. This principle has been established in various case law amongst them being ***RV Jackson Mwalulu & Others Court of Appeal Nairobi 310 of 2004 (unreported)*** and ***RVs David Makali & Others Court of Appeal (Criminal Application No. NAI 4 and 5 of 1995 (unreported)*** where Tunoi J A stated:

“the test in objective and the fact constituting bias must be specifically alleged and established. It is my view that where such allegation is made, the court must carefully scrutinize the affidavit on either side”.

18. In both cases, the court emphasized the need to disallow frivolous application which would tend to undermine the public confidence in the judiciary.

19. In the South African case of ***South African Commercial Catering and Allied Workers Union and Others vs Irrin & Johnson Limited Seafoods Division Fish Processing CCT 2/2000 (Constitutional Court of South Africa)*** the learned judges partly expressed themselves as follows:

“The Test for recusal:-

“In Sarfu, this court formulated the proper approach to recusal as follows- the question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear or the adjudication of the case that is on mind open to persuasion by the evidence and the submission of counsel.

The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour and their ability to carry out that oath by reasons of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant person beliefs or predisposition. They must take into account the fact that they have a duty to sit on any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer must not hesitate to recuse herself or himself if there are reasonable grounds on the part of the litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial”.

20. The above test for recusal as set out in the Sarfu case was then explained in the case of Allied Workers (Supra) as follows:

“Some salient aspects of the judgment merit re-emphasis in the present context. In formulating the test in the terms quoted above, the court observed that two considerations are built into the test itself. The first is that in considering the application for recusal, the court as a starting point presumes that judicial officers are impartial in adjudicating disputes. As later emerges from the Sarfu judgment, this in-built aspect entails two further consequences, on the one hand, it is the Applicant for recusal who bears the one of rebutting the presumption of judicial impartiality. On the other, the presumption is not easily dislodged. It requires cogent or convincing evidence to be rebutted the second –in-built aspect of the test is that absolute neutrality is something of a chimera in judicial context. This is because judges are human. They are unavoidably the product of their own life experience and the perspective thus derived inevitably and distinctively informs each judge’s performance of his or her judicial duties. But colourness neutrality stands in contract to judicial impartiality. A distinction the Sarfu decision itself vividly illustrates impartiality is that quality of open – minded readiness to persuasion without refilling adherence to either party or to the Judges own predilections preconceptions and personal views that is the keystone of a civilized system of adjudication. Impartiality requires in short, a mind open to persuasion by the evidence and

the submissions of counsel and in contrast to neutrality, this is an absolute requirement in every judicial proceeding. The reason is that:

“A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before courts and other tribunals. Nothing is more likely to impair confidence in such proceedings, whether on the part of the litigations or the general public that actual bias on the appearance of bias in the official or officials who have the power to adjudicate on dispute”.

21. On the 2nd issue for determination the Applicants have submitted that they have reasonable apprehension that they would not get justice in this case based on orders/rulings given previously by this Honourable Court. The orders previously given by court were of an Injunctive nature initially limited to the Applicants who are currently serving in position of Chief Manager, Human Capital & Administration/Chief Manager Licencing & Standards and Chief Manager, Compliance and Enforcement. The orders barred the Respondent herein from administering, renaming or taking any steps or further steps to recruit or retain any person or persons to their positions. The application stemmed from the Respondents decision to restructure their organization.

22. In essence the Applicants had sought similar orders to extend to other positions occupied by persons not parties to this suit and initially the court declined to extend this order to them.

23. However upon realization that the orders of court could end up being futile, the court did extend these orders to the other positions and this was done on 15th April 2015 in the presence of both parties. The contention that it was made after an ex parte application by the Applicant is erroneous. In any case, restructuring of an organization cannot be made for certain offices while others are left out. The Court considered the merits of extending the orders to other positions to have uniformity in the organization depending on the final order this Court will render.

24. The Respondents sought an order to set aside the orders given but his court declined on the premise that a ruling was pending in court and it would cover the issues raised by the Applicants herein.

25. The chronology of events undertaken by court show reasons to preserve substratum of the applications so that the court does not end up giving any order in vain by reasons that the orders are overtaken by events. In giving orders complained of, the court was within the principles of judicial impartiality stated above.

26. It has not been shown that the orders so far given are fouled with bias or whether a reasonable objective and informed person would on the correct facts reasonably discern bias.

27. The fact that the Respondents have not got a favourable judgment or ruling previously is not perse an indication of bias on this Honourable Court. This court has taken its Judicial Oath to perform its judicial work without fear of favour. It will remain true to this oath to do justice.

28. The test of reasonable apprehension of bias as stated above when tested in the current circumstances do not in this court's view lead to a reasonable apprehension, in view of a reasonable, fair minded and informed member of the public that this court did not and will not apply its mind to the case impartially. The Applicants have their perceptions but in considering what would be perception of a member of public, I find no bias in this court's view.

29. In the case of ***Tatu City & 3 Others vs. Stephen Jennings & 6 Others, High Court of Kenya at Nairobi Milimani Law Court – Commercial Division Civil Case No. 46/2015***, a similar application was made before the High Court and in dismissing this application, the Honourable Judge was quick to point out that allowing an unsubstantiated application such as the one before him was tantamount to gagging a Judge from conducting his duty.

30. Similar allegations were also made in the ***Industrial Court at Nakuru Joseph Maina Theuri vs Kabugi & 3 Others 2013 (eKLR) Case No. 363/2013*** and Honourable J. Ongaya declined to recuse

himself stating that: ***“The grounds as alleged may be summed up to include that the presiding Judge made Interlocutory Orders in favour of the Claimant and against the Respondents despite the Respondents opposition; the Respondents are not satisfied with some of the Interlocutory Orders allegedly that the Judge may not have considered some of the materials before the Court and generally that the Respondents are not happy with the Interlocutory Orders”.***

31. J. Ongaya further stated that:

“The Court considers that the Judge carries an ethical obligation for recusal if the Judge known 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”.

32. The Court of Appeal in a 5-bench application was also faced with an application for recusal in the **Teachers Service Commission vs. Kenya National Union of Teachers & 3 Others Case Civil Appeal No. 196/2015**. The learned Judges unanimously declined to grant the application for recusal stating thus:

“in an application for recusal, perception and suspicion are relevant issues to be considered. Judicial decisions indicate that there is need for a reasonable basis and foundation for having suspicion or holding a particular perception. The affidavit in support of the present application deposed by Wilson Sossion in paragraph 10 of the affidavit raises serious allegations whose veracity has not been demonstrated. The allegations in this paragraphs, without disclosure of the sources amount to hearsay and speculation.

We are not satisfied that a scintilla of credible and verifiable evidence reasonably backing the suspicion or perception has been disclosed in the supporting affidavit. There is no allegation against any of the three Judges of having a personal or pecuniary interest in the appeals or allegations of impropriety. However, there is allegation of being handpicked and micro-managed by the President of the Court of Appeal. No basis for these allegations has been disclosed.

Allowing the application on the basis of unsustainable allegations would not only be interfering with independence of the bench and dereliction of the constitutional duty of Judges who have taken an oath of office but also undermine the independence of the judiciary as stipulated in Article 160(1) of the Constitution.”

33. Having considered the submissions made before me and after analyzing the principles of recusal and the law, it is my finding that the allegations made against me of bias pursuant to the decisions I have so far rendered in the matter are but meant to interfere with my independence as a Judge. I have taken my oath of office to do justice without fear, favour, ill feeling, disaffection and threats. I stand true to this oath and I am persuaded that I am and will do justice at all times. I find no justifiable reason to warrant my recusal from this matter and I therefore dismiss this application accordingly with costs to the Respondents. I will therefore endeavor to deliver the ruling pending in Court on an appropriate date.

Read in open Court this 21st day of October, 2015

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Makhoha for Applicants – Present

Owuor holding brief for Mr. Ahmed Nasir for Respondents