



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NUMBER 1107 OF 2015**

**ELIZABETH IRAKO SHIAKAMIRI.....**  
**.....CLAIMANT**

**VERSUS**

**NATIONAL COUNCIL FOR PERSONS WITH DISABILITIES.....**  
**.....RESPONDENT**

**RULING**

1. On 22<sup>nd</sup> September, 2015 the Court's attention was drawn to a letter dated 9<sup>th</sup> September, 2015 written by the respondent to the Office of the Judiciary Ombudsperson making accusations against myself and Lady Justice Mbaru. The author of the letter a Mr. Mohammed H. Gabbow who described himself as the Executive Director of the respondent accused both of us of displaying partiality and open bias against it. These accusations were premised on certain orders or directions which were made in this matter which the respondent appeared not happy about.

2. In brief the author of the letter stated that the claimant herein disputing her transfer, moved to Court to stop a disciplinary process which was triggered by her refusal to proceed on transfer. According to Mr. Gabbow, the disciplinary process was not concluded because the claimant moved to Court and obtained orders ex-parte restraining the continuance of the disciplinary process. It was Mr. Gabbow's view that the orders were obtained through misrepresentation of facts and that the orders had the effect of finality without the respondent being given an opportunity to be heard. Mr. Gabbow accused both of us of

- a. bending well established judicial safeguards, processes and procedures to the detriment of the Council despite clear misrepresentation of facts and law at ex-parte stage.
- b. constant grant of ex-parte orders with finality implications without according the Council an opportunity to be heard.

3. In view of those accusations Mr. Gabbow contended that the respondent had legitimate concern over impartiality and fairness of the orders made by myself and Lady Justice Mbaru. For this reason, Mr. Gabbow asked that we both recuse ourselves from further handling this matter and that we be investigated for showing open bias and favour to one party at the expense of due and impartial judicial process.

4. When the attention of the Court was drawn to the contents of this letter by Mr. Omondi who appeared on behalf of the respondent, I directed that given their serious nature, they be reduced in

form of an affidavit, filed and served on the claimant counsel to enable them respond to the same at the same time give the Court an opportunity to test and appreciate the veracity of the allegations, made on oath.

5. Mr. Gabbow complied with the Courts directions and reduced the allegations in the form of an affidavit which he swore on 19<sup>th</sup> October, 2015 and filed on the same day.

6. In order to expedite this matter the Court saw no need for the claimant to file a response to the affidavit since accusations were directed at the Court and not the claimant strictly speaking. I therefore directed that I would retire to consider the averments in Mr. Gabbow's affidavit and see if they disclosed material grounds in support of the allegations and sufficient enough to merit an order of recusal by myself and Lady Justice Mbaru.

7. I have carefully considered Mr. Gabbow's affidavit and analysed the issues raised in his depositions and they seem to me to revolve around the orders made by Justice Mbaru and I on each occasion the file may have come to either of us in the course of our duties. Here is a chronology of minutes and orders made in this matter in so far as relevant to Mr. Gabbow's accusations.

- a. On 29<sup>th</sup> June, 2015, the applicant herein moved the Court through an application dated 26<sup>th</sup> June, 2015 brought under certificate of urgency seeking orders among others that the Court issues an order restraining the 1<sup>st</sup> respondent from terminating or in any other manner dealing with the employment of the applicant until the full determination of the application. The matter came before me as the duty Judge and I granted this order to last until 15<sup>th</sup> July, 2015 when the matter was scheduled to be heard interpartes upon service on the respondent.
- b. On 15<sup>th</sup> July, 2015 when the matter came up for interpartes hearing, Mr. Omondi who appeared for the respondent informed the Court that he was not ready to proceed because the respondent's file in dispute was forwarded to the Auditor General's Office and the same had not been returned by the time of going to Court. Mr. Omondi therefore sought more time to respond to the application. He further informed the Court that the orders made by the Court on 29<sup>th</sup> June, 2015 had been complied with and that his client had no problem with them remaining in force pending the determination of the application. I therefore granted the respondent 7 days to file a replying affidavit and extended the interim orders to last until 13<sup>th</sup> October, 2015 when I directed that the matter be mentioned for further directions.
- c. On 23<sup>rd</sup> July, 2015, Mr. Omondi despite informing the Court that the respondent had no problem with the orders remaining in force pending the hearing and determination of the application dated 26<sup>th</sup> June, 2015, brought an application under certificate of urgency dated 21<sup>st</sup> July, 2015 seeking the setting aside, review of variation of the orders made on 29<sup>th</sup> June, 2015 and 15<sup>th</sup> July, 2015 respectively. This application was placed before my brother Justice Nzioki Wa Makau who certified the same urgent and directed that it be served and placed before me on 29<sup>th</sup> July, 2015.
- d. On 29<sup>th</sup> July, 2015 when the matter came before me, I considered the two applications, one dated 26<sup>th</sup> June, 2015 and the one dated 21<sup>st</sup> July, 2015 and became of the view that in the interest of time and speedy disposal, the application dated 26<sup>th</sup> June 2015 be heard on merit and that the replying affidavit to the application sworn by one Ruth Ruraa in opposition thereof as well as one sworn on 21<sup>st</sup> July, 2015 in support of the application dated the same date be treated as response to the claimant's application dated 26<sup>th</sup> June, 2015. The disposal of the application dated 26<sup>th</sup> June, 2015 would concurrently dispose of the application dated 21<sup>st</sup> July, 2015. I therefore set the application dated 26<sup>th</sup> June, 2015 for hearing on 29<sup>th</sup> October, 2015 and extended the interim orders obtained on the 26<sup>th</sup> June, 2015. On complaint by the claimant's Counsel that the orders made on 29<sup>th</sup> June, 2015 had not been complied with, I directed that the respondent to honour the order of the Court in

default the claimant be at liberty to move the Court for the respondent's responsible officer to appear and show cause why he or she should not be cited for contempt of Court.

- e. On 10<sup>th</sup> August, 2015 the claimant through her counsel appeared before Lady Justice Mbaru with an application dated the same day seeking orders among others leave to be granted for the claimant to commence contempt of Court proceedings against the respondent's Executive Director Mr. Mohammed H. Gabbow and Human Resource Officer Ms. Ruth Ruraa for failing to honour the orders of the Court made on 29<sup>th</sup> June, 2015. Lady Justice Mbaru granted the leave sought and directed that the matter be mentioned on 7<sup>th</sup> September, 2015 for further directions.
- f. On 8<sup>th</sup> September, 2015 the respondent once again filed an application dated the same day seeking orders among others that the Court sets aside, review or vary its orders made on 10<sup>th</sup> August, 2015. When the application was placed before me as the duty Judge, I directed that the same be served on the claimant for interpartes hearing on 22<sup>nd</sup> September, 2015.
- g. On 22<sup>nd</sup> September, 2015 when the application dated 8<sup>th</sup> September 2015 was due to be heard, Mr. Omondi for the respondent informed the Court that the respondent had written to the Judiciary Ombudsperson complaining over open bias by the Court in the matter. Having listened to Mr. Omondi, I directed that in view of the seriousness of the allegations against myself and lady Justice Mbaru, the respondent's responsible officer making these allegations namely Mr. Gabbow, reduce the same in form of an affidavit. This was done on 19<sup>th</sup> October, 2015.

8. I have attempted as elaborately as possible, to set out the chronology of events as minuted by the Court in this matter. At the centre of the respondent's complaint seem to be the orders made by the Court on 29<sup>th</sup> June, 2015 which directed that the respondent be restrained from terminating or in any other manner interfering with the employment of the claimant until the full determination of the application dated 26<sup>th</sup> June, 2015. These orders were to last until 15<sup>th</sup> July, 2015 when the matter was scheduled to be heard interpartes. This did not happen as Mr. Omondi for the respondent said he needed more time to respond to the application. Counsel further informed the Court that his client had complied with the Court order and that the respondent had no problem with the orders remaining in force until the application is heard and determined. The application was therefore scheduled for hearing on 13<sup>th</sup> October, 2015.

9. In strange turn of events, on 23<sup>rd</sup> July, 2015 the selfsame Mr. Omondi sought the setting aside or variation of the very orders he had earlier informed the Court his client had complied with and had no problem with them remaining in force pending the hearing and determination of the application dated 26<sup>th</sup> June, 2015 which was scheduled for 13<sup>th</sup> October, 2015. When this application was placed before me and in the interest of time and effective case management, I gave direction that the two applications namely the one dated 26<sup>th</sup> June, 2015 and the one of 21<sup>st</sup> July, 2015 be heard on merit 29<sup>th</sup> October, 2015 and that Mr. Ouma's application dated 21<sup>st</sup> July, 2015 be deemed as a response to the claimant's dated 26<sup>th</sup> June, 2015. There was however complaint by Mr. Wangalwa for the claimant that contrary to representation by Mr. Omondi, the respondent had not complied with the order of the Court made on 29<sup>th</sup> June, 2015 directing the respondent not to terminate or in any manner interfere with the claimant's employment. I therefore in the protection of the dignity, respect and integrity of the Court directed that if that be the case, Counsel for the respondent, Mr. Omondi as an officer of the Court, should advise his client, the respondent on the importance of respecting Court orders. I further said that the claimant would if the disobedience persist be at liberty to cite the respondent's responsible officers to appear before Court to show cause why contempt proceedings cannot be commenced against them. It would seem the disobedience persisted prompting Mr. Wangalwa to file the application dated 10<sup>th</sup> August, 2015 seeking leave to commence contempt proceedings against respondent's responsible officers. Judge Mbaru granted the leave sought which quickly attracted yet another application from Mr. Omondi for setting aside of those orders. I directed, as any

Judge would in an application of this nature, that Mr. Omondi serves the application on Mr. Wangalwa for interpartes hearing on 22<sup>nd</sup> September, 2015. When the application came up for hearing as scheduled Mr. Omondi came up with the allegations of bias against myself and Judge Mbaru and urged that we recuse ourselves from this matter.

10. Whereas the respondent accuses myself and Judge Mbaru of issuing orders without hearing them, the only substantive order the Court has ever made was the one made on 29<sup>th</sup> June, 2015 on the application which restrained the respondent from terminating the claimant's services. This order was to last for a period. That is to say pending the hearing and determination of the application interpartes which was set for 15<sup>th</sup> July, 2015. However, Mr. Omondi after representing to the Court that his client had complied with the order and had no problem with them remaining in force pending the hearing of the application dated 26<sup>th</sup> June, 2015 instead brought an application seeking variation or setting aside of these very same orders. As stated earlier, in order to save on judicial time and expedite the hearing of the interlocutory applications, I merged the two applications and set the one dated 26<sup>th</sup> June, 2015 as the lead application and fixed both for hearing on 29<sup>th</sup> October, 2015. This did not come to pass because the claimant sought leave to commence contempt proceedings against the respondent and further the present allegations of bias against myself and Justice Mbaru.

11. The Court makes two observations so far. One, at no time has the respondent been ready to proceed with the initial application in respect of which the interlocutory orders were made. Instead the respondent counsel has exhibited a curious practice of applying to set aside or varying of Court orders instead of successfully fighting them at inter partes hearing. Second, the respondent seems not to be very pleased with the orders the Court made on 29<sup>th</sup> June, 2015 but has not shown the will to resist and discharge the same at inter partes hearing.

12. Whereas it is within the right of any party to seek the setting aside or variation of an order made ex parte such an application should be made sparingly especially where it can be ably demonstrated that the ex parte order was procured through misrepresentation of facts or contrary to law and that the applicant stands so extremely prejudiced by the ex parte orders that it cannot wait for hearing inter partes. In most cases, competent lawyering is to fight the orders at inter partes hearing and get the same discharged since just because a party has obtained an ex parte order does not mean the same cannot be discharged after inter partes hearing.

13. Concerning accusation of bias and judicial misconduct, these are very serious allegations to confront a Judge with. It does not mean they cannot be made, but they should be made with circumspect and in the face of credible and sustainable evidence. Judges and indeed all judicial officers are the epitome of our judicial system. Their conduct in the course of their duties and sometimes even in their social and private lives must be one that upholds and sustains the dignity, respect and integrity of the judiciary as one of the institutions representing the sovereign will of the people of Kenya. To accuse a Judge of bias and judicial misconduct without any reasonable cause is therefore an affront to rule of law and must be abhorred by every law abiding citizen.

14. Judges will always make orders for or against one party or the other. It is natural that the party not on the favourable side of the order will obviously not be happy but that is the essence of judicial determination. However, simply because a party may not be happy with an order a Court has made is not reason enough to hurl accusation of bias and judicial misconduct upon a Judge and require such Judge to recuse himself or herself.

15. Such a behaviour if condoned would amount to intimidation and interference of judicial independence of such Judge. It would create a window for mischievous litigants to use flimsy accusations against a Judge in order to forum-shop for a Judge whom such litigant feels would be favourable to him or her.

16. The foregoing having been said and after careful analysis of the allegations raised by the

respondent against myself and Justice Mbaru, I am of the honest opinion that the same are not only spurious but are baseless and are merely intended to cover up for the respondent disobedience of this Court's order and a veiled but futile attempt to shop for a favourable Court if there is any such Court in this tier but which is doubtful. They do not constitute credible and reasonable accusations against myself and Judge Mbaru to warrant me and her recusal from this matter.

17. The order of this Court made on 29<sup>th</sup> July, 2015 concerning the hearing and determination of the applications dated 26<sup>th</sup> June, 2015 and the one dated 21<sup>st</sup> July, 2015 will remain in force with the consequence that these applications will be set for hearing on a date I will allocate at the conclusion of this ruling.

18. The respondent is further directed to comply with the order of the Court made on 29<sup>th</sup> June, 2015 if not already in default the claimant shall be at liberty to commence contempt proceedings against the respondent's responsible officers.

19. It is so ordered.

Dated at Nairobi this 6<sup>th</sup> day of November 2015

Abuodha J. N.

Judge

Delivered this 6<sup>th</sup> day of November 2015

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge