



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO.66 OF 2013

KAYUM KHAN CLAIMANT

VERSUS

**INTERNATIONAL COMMERCIAL COMPANY (K) LTD
RESPONDENT**

RULING

Kayum Khan – claimant in person

Karimbux-Effendy & Co. Advocates – for the respondent

1. The claimant through Notice of Motion dated 28th October 2013 filed under Rule 16 of the Industrial Court procedure Rules 2010 and section 12 of the Industrial Court Act is seeking stay of proceedings pending appeal against the court orders of 11th October 2013 and further for the Judge to disqualify self from the case. This application is support by the annexed affidavit of the claimant; no grounds have been outlined under the application. This application was opposed by the respondent through their Grounds of Opposition dated 6th November 2013 and the Replying Affidavit sworn by Saadia Karimbux-Effendy, the advocate for the respondent.

2. The claimant in the application state that;

1. *Court orders of 11th October 2013 dismissing with costs application for leave to amend Memorandum of Claim and requiring defence hearing date be fixed be stayed until determination of Appeal against the said orders*
2. *That the trial Judge, Honourable lady justice Monica Mbaru, do disqualify herself from continuing with determination and adjudication upon this matter as otherwise it will occasion a breach of claimant's constitutional rights to a free and fair trial and claimant will be denied justice*
3. *Costs be provided for*

3. In the affidavit the claimant stated that he is acing in person and when he filed his application dated 8th July 2013 seeking leave to amend his memorandum of claim to include another claim for remuneration due to him when he was in the employment of the respondent and was promoted to the position of administrative Manager and thus be able to complete his claim that in whole was based on unfair termination. That to include the new claim there would be an amendment to the claim where the amount being claimed would amount to Kshs. 3,230,047 from Kshs.2, 426,144.00 an increase of kshs.803, 903.00 if the amendment were to be allowed. The court dismissed this application vide ruling dated 11th October 2013 and directed the defence to proceed. The claimant has filed a Notice of Appeal against the whole

ruling as he would be denied justice is the hearings are to continue without his amended claim which includes a substantial amount and thus is seeking for stay orders pending the hearing of his appeal.

4. The claimant further states that he will suffer loss as it would be precluded from making a second claim against the respondent with the new and additional information that he has in his application for amendment of his claim. He would lose a substantial amount.

Other reasons for the application are that various rulings and submissions have been omitted from the court proceedings. On 8th March 2013 a request to court seeking to have documents from third parties is missing. This request was on the basis that the respondent has denied ever employing the claimant as the Administrative manager. The court denied the request and this is not on the record. That the court directed that parties cannot be forced to produce evidence they did not wish to. On 23rd April 2013 the claimant indicated to court that the respondent had not filed their memorandum of appearance or appointment and thus filing a defence was by a Stanger to which the court directed the respondent to file this appearance which was done on 2nd May 2013. On 27th May 2013 when the respondent first witness was about to take the witness stand, the claimant objected on the basis that he had not been provided with witness statement to which the court directed be done but the court later allowed the witness to proceed without availing the witness statement. There was also re-examination of the witness on new matters that the court allowed to the prejudice of the claimant who was not allowed to do further cross-examination. On the same date all the respondent witnesses were seated in court while their first witness was on the stand hence heard what the entire first witness had said yet the claimant had not been issued with their witness statements. This was contrary to common law and court practice as these witnesses should have been outside the court.

6. The proceedings do not capture verbatim what the entire claimant said while in court. On 23rd July 2013, when the claimant addressed the court on his application, his opening remarks are not noted by the court. On 21st October 2013 the claimant's objection to the respondent filing two documents that of grounds of opposition and replying affidavit and that one should be struck off was is not on record. On 19th September 2013, the claimant objections were not recorded. There are errors, omissions and distortions on the record. The court record is of significant importance and can be in summary where possible. But the omissions in this case are of high material significance and biased that have deprived the claimant a free and fair trial and hence seek to exercise the right to seek appeal.

7. The claimant further states that the trial Judge was not keen to listen to his pleadings and constantly interrupted him and when the claimant's application to amend his pleadings came up for hearing, the judge remarked that the hearing of the claimant's case had closed and for the Judge to continue hearing this case, the claimant will suffer injustice and his right to a free and fair hearing will be greatly jeopardised. Justice Mbaru should therefore disqualify herself from hearing this case.

8. In submissions, the claimant indicated that he was solely relying on his application as filed seeking stay of orders in the court ruling dated 11th October 2013 until his appeal is heard and that the Judge should disqualify herself.

9. The respondent In reply there are grounds of opposition noting that the application lack merit, is actuated by malice and not filed in good faith as there is no demonstration that there is an arguable appeal that would be rendered nugatory if the trial is to proceed as justice and rule of law have not been compromised and due process has been realised and the allegations of bias and or impropriety by the judicial officer as there is no evidence or real or imputed bias or the possibility of bias in exercising judicial discretion. The claimant has displayed unsubstantiated suspicion of personal bias and prejudice as the Judge gave directions while exercising discretion which should not be interfered with except in exceptional circumstances. The cited instances are only serving the claimant's interests and the orders being sought. The application is not objective of the court to facilitate the just and expeditious resolution to disputes as under section 3 of the Industrial Court Act. The claimant has failed to comply with the court directions. Litigation should come to an end at some point and the stay of proceedings would result in improper utilisation of scarce judicial time and the matter taking unduly long to adjudicate to the

detriment of the parties.

10. In submissions, Karimbux-Eddendy stated that the respondent continues to suffer due to the continued filing of various applications by the claimant. The appeal suggested by the claimant regard a ruling that came mid the hearing when the claimant had already closed his case. The right to appeal cannot be faulted but the court need to stop all the interlocutory applications and there are various authorities in judicial decisions as to why the court should not stay proceedings on the basis that the court should use discretion judicially and note the losses to the other party as held in *David Morton Silverstein versus Atsango Chesoni [2002] eKLR*.

11. There is no good reason why the claimant has applied for a stay of proceedings and the onus is on him to show that his claim will be rendered nugatory if the application is not granted. There is a notice of appeal but no grounds have been outlined. No loss will be suffered by the claimant if the stay is not granted.

12. On the ground that the Judge should disqualify self, there is no legal or factual basis of bias. Section 12 of the Industrial Court Act and the Industrial Court procedure Rules there is no provision to have the judge disqualification. An applicant must show pecuniary interest as held in *Jasbir Singh Rai 3 Others versus Tarlochan Sigh Rai & 4 Others [2013] eKLR*. There are no instances of unfairness that have been demonstrated by the claimant.

13. In *David Mwangi Muiruri versus Chief Magistrate's Court Malindi and Others [2012] eKLR* where the court held that the judge takes Oath to administer justice in all cases. Bias must be established noting that some litigants who lose their cases refer to bias. In this case, the claimant made his application for disqualification after the court dismissed his application to amend the claim. Applications must be based on justice immediately this is established but not to bring pressure on the court. Article 159(2) of the Constitution, justice is to all parties and should not be delayed as proceeding should be conducted without undue regard to technicalities and the claimant application should therefore be dismissed.

Determination of the issues

There are two main issues

Whether there should be stay of proceeding pending appeal

Whether the judge should disqualify self in this case

14. On the second issue for disqualification, I must go back to the background of this case and outline the following; the claimant filed his claim in person on 21st January 2013.

On 7th February 2013 the respondent thorough their advocate Karimbux-Effendy filed the defence; on 11th February 2013 the claimant filed his Further and better Particular;

On 20th February 2013 the claimant filed an Amended Further and better particulars;

On 21st February 2013 the claimant filed a Reply to the Respondent's Defence;

On 22nd March 2013 the respondent filed their List of Documents;

On 29th April 2013 the claimant filed his Additional Documents

On 2nd May the respondent filed Supplementary List of Documents

On 22nd May 2013 the respondent filed the List of Witnesses

On 24th, the claimant filed his Statement

On 3rd July 2013 the respondent filed their Witness Statement;

On 8th July 2013, the claimant filed his Notice of Motion seeking to amend his claim under Certificate of Urgency this Notice of Motion was dismissed by the court in a ruling dated 11th October 2013.

15. The matter first came before court on 8th March 2013 when the claimant sought directions with regard to documents he required from the respondent and various other third parties and the court duly gave directions which led to the exchange of various documents before the parties before court and as concerns documents with other third parties, the court went on to give directions noting that the claimant had not indicated the relevance of the documents held by third parties and that the claimant was to use the documents in his possession and those issued to him by the respondent noting the Rules of procedure and the Industrial Court Procedure Rules. Upon the court being satisfied that all the necessary documents had been exchanged and that the claimant's claim could proceed without the need to produce documents that were stated to be in the possession of third parties, the claimant proceeded to adduce his evidence and closed his case. The respondent commenced their case with the call of their first witness as their list indicated. He was cross-examined by the claimant and then re-examined by the advocate for the respondent. At this point the claimant wanted to further cross-examine the witness and he thus raised objections when the court disallowed this procedure.

16. As noted above, the claimant has been acting in person while the respondent is represented by an advocate. The court has in view of the Industrial Court Act and the Rules thereto been aware of this fact and has not overly relied on procedures despite the fact that the claimant is a well learned person who has been prosecuting his case.

Is this then a case that the Judge should disqualify self?

17. The subject of a judge disqualification is not new to Kenyan courts; this has been a subject of many courts and jurisdictions all over the world. Where used in its strict sense, disqualification of a judge from a matter has typically been reserved for situations which involve the statutory or constitutional mandated removal of a judge, upon a request of a moving party as against a request for recusal which is traditionally been used to refer to a judge to stand down from a matter voluntarily. Therefore to ask a judge to disqualify oneself, clear constitutional and statutory requirements not met by the judicial officer must be outlined and the principle here is that judges should be fair and impartial with good examples being that a judge should not participate in a matter in which a litigant is his or her friend, a kinsman or someone whom is personally disliked to the judge. There must be a legitimate basis for a party to enjoy such provisions by application of statute or the constitution and mere suspicions or fear for bias is no basis enough to warrant a judge disqualification in a matter.

18. While the right to seek judicial disqualification is intended only as guarantee to litigants of the right to a fair and impartial trial or hearing, the same should not be used as a means for improving their odds with another judge who may be more receptive to their cause. The obvious potential for abuse is intrinsic in making judicial disqualification widely available to litigants; the same should be used upon good reason and upon one warning oneself of the danger of abuse and the availability of other judicial action like right of appeal or right of review. Therefore before making or moving a court with a disqualification motion a party or advocate must apply and exercise the duty of reasonable inquiry into the matter. As pointed out by the Respondents in their submissions, this is a subject that the Supreme Court has already gone into in the case of ***Jasbir Singh Rai and 3 Others versus Tarlochan Singh and 4 Others, petition No. 4 of 2012 (2013) eKLR*** where the 5 judges sitting were confronted with the questions as to whether a judge as a matter of personal conviction or of ethical considerations, can recuse himself/herself from decision making and how the Court should guide itself on the issues of recusal in light of unique position to the integrity provisions in the Constitution and went on to hold;

According to the definition in the Black's Law dictionary, it was evident the circumstances calling for a recusal for a judge are by no means case in stone. The perception of fairness of conviction of moral authority to hear the matter was the proper test of whether or not the non-participation of the judicial officer was called for. The objective view in the recusal of a judicial officer is that

- a. *Justice as between the parties be uncompromised;*
- b. *The due process of law be realised and be seen to have had its role and lastly;*
- c. *The profile of the rule of law in the matter in question is seen to have remained uncompromised.*

19. This was a case for recusal as unlike the case for disqualification. One is voluntary the other moved by the party seeking disqualification. But the principles applicable in both scenarios apply and I note the Supreme Court Justices went on to hold;

[It must be] invoked for good cause and it is not to be invoked without weighing the merits of such invocation against the constitutional burdens of the court and the public interest.

20. Similarly, the superior courts have a constitutional duty to undertake and only for good cause should a party apply or move the court upon reasonable inquiry to disqualify itself. This was buttressed by the citation from the Court of Appeal decision in **Republic versus Mwalulu and 8 Others [2005] eKLR** where the Judges of Appeal at Page 5 the case of **Metropolitan Properties Co. (FG.C) Ltd versus Lannon and others (1969) 1 Q.B.**

That being the position as I see it when the courts in this country are faced with such proceedings as these (i.e. proceeding for disqualification of a judge) it is necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to be produced in the minds of the public at large a reasonable doubt about the fairness of the administration of justice. The test is objective and the fact constituting bias must be specifically alleged and established. It is my view that where any such allegation is made, the court must carefully scrutinise the affidavits on either side, remembering that when some litigants lose their cases before a court or quasi-judicial tribunal, they are unable or unwilling to see the correctness of the verdict and are apt to attribute that verdict to a bias in the mind of the judge.

21. In the case of **R. versus S. (R.D), (1997) 118 CCC, 353** the judge held that courts have recognised that there is a presumption that judges will carry out their oath of office with due diligence;

... This is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high. However, despite this high threshold, the presumption can be displaced with cogent evidence that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias.

22. A reasonable litigant should take these considerations into account when making an application for a disqualification of a judicial officer in a matter. The presumption in favour of a judges' impartiality must therefore be taken into account whether such a reasonable litigant would have a reasonable apprehension that the judicial officer was or might be biased. This is simply because absolute neutrality on the part of a judge can hardly if ever be achieved. In the words of **Benjamin N. Cardozo in The Nature of the Judicial Process (1921) at 12 to 13;**

There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognise and cannot name, have been tugging at them – inherent instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social need ... In this mental background every problem finds its setting. We may try to see things objectively as we please. Note the less, we can never see them with any eyes except our own. ... Deep below consciousness are other forces, the likes and dislikes, the predilections and the prejudices, the complex of instincts and emotions and habit and convictions, which make the person, whether she or he be the litigant or judge.

23. Like in this instant case, the claimant has already outlined his case; his application to amend his claim was addressed and dismissed. The respondent is midway his case where one witness has given evidence while two more witnesses are awaited. The case is still fresh and has not closed. The claimant has not outlined his final submissions. No judgement has been reserved as the case is still ongoing. I find no ground for the disqualification noting The nature of the judicial function involves what the Constitutional Court of South Africa in ***President of the Republic of South Africa and Others versus South Africa Rugby Football Union and Others CCT 16 of 1998 read on 4th June 1999*** in the famous 'Judgment in the recusal application' said includes the performances of difficult and at times unpleasant tasks. Judicial officers are nevertheless required to administer justice to all persons alike without fear, favour or prejudice, in accordance with their Oath, the Constitution and the law. To this end they must resist all manner of pressure, regardless of where it is comes from. This is the Constitutional duty common to all judicial officers. If they deviate, the independence of the judiciary would be undermined, and in turn, the Constitution itself.

24. There is therefore no basis in law or in fact upon which this court should disqualify itself, and that being the case, I reject this prayer.

25. The second limb of the application is a stay of proceedings pending appeal and determination against the court ruling of 11th October 2013.

As a rule, the court will only grant a stay if there are special circumstances which must be deposed in an affidavit. The justice of the case on a stay application is arrived at by striking a judicious and equitable balance between the principle that there should be an end to litigation and that justice should be expeditious to both parties. These are ongoing proceedings where the claimant is seeking to appeal a ruling that he feel did not go his way and despite this being his case a party should not hold the other at ransom simply because they are the respondents accused of undertaking unfair practices as this is still pending undetermined. There is still no successful party so as to claim an acquired vested interest in the outcome of the case and the intended appeal must be taken in the context that a successful party in litigation has acquired a vested interest in the outcome of the case whereas the other party who loses or who appeals merely has an interest contingent upon a successful outcome of his appeal.

26. The stay of proceedings relate to the court ruling delivered on 11th October 2013. This application was filed on 8th October 2013. As outlined above in the motions since this claim was filed, the claimant has been vigilant and unrelenting to protect his rights. Despite acting in person, the claimant has followed his claim step by step to ensure the arbitration and final conclusion.

27. However in an application for stay of proceedings, even where an appeal has been lodged, and the court must be satisfied of the special circumstances that warrant such a proviso. I say this primarily for the reason that courts should discourage parties who lose any motion on merits from stalling further proceedings; by keeping the litigation alive through appeals or to gain respite against further action until the matter goes their way.

28. The special circumstances must at all material times be satisfied that indeed the balance of convenience is in favour of the applicant and that it is apparent that unless a stay is granted an appeal will be rendered nugatory, and that there is an arguable appeal. This Court was not given an opportunity to see the Appeal or a draft appeal that the claimant seeks to rely on in challenge to the ruling of this Court.

29. The "nugatory" ingredient is not an exclusive or a singular condition. It is an essential condition precedent which if not made out to the satisfaction of the court, a stay will not be granted, whatever the merits of the appeal and the balance of convenience. Similarly, if the other two ingredients, *that is* "an arguable appeal" and the "balance of convenience" are not made out to the satisfaction of the court then a stay will not be granted. It seems to me that anyone of the three traditional core ingredients would not suffice to tilt the balance in favour of a stay of proceedings.

30. Has the applicant demonstrated to this court that these essential conditions precedent to granting orders of stay of proceedings?

31. What is before this court for determination in the application seeking stay of proceedings, no memorandum of appeal in draft or as an annexure has been made available to this court. Hence the submission that the appeal will be rendered nugatory does not hold.

32. The claimant stated that he will lose a claim of Kshs. 803, 903.00 if he is not allowed to amend his claim. The claim is not concluded so as for the claimant to justify denial of such amounts. No award has been awarded to the claimant. The claim is at its preliminary stages.

33. The balance of convenience therefore shifts to the benefit of the Claimant who will suffer loss and damage.

34. There was no material before me to convince the court that a stay should be granted. If the stay is granted, the result would be a denial of justice bearing in mind that the respondent's circumstances. The stay would definitely perpetuate an injustice. I refuse to grant the stay for the reasons as above.

Application dated 28th October 2013 is hereby dismissed. Costs shall be in the cause. Parties to take hearing dates at the registry.

Delivered at Nairobi and dated this 24th day of **January** 2014.

M. Mbaru

JUDGE

In the presence of:

Lilian Njenga: Court Assistant

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