



REPUBLIC OF KENYA

Industrial Court of Kenya

Petition 5 of 2013

**KENYA HOTELS & ALLIED WORKERS UNION.....
CLAIMANT**

VS

**THE MINISTER OF LABOUR & 3 OTHERS.....
.....RESPONDENTS**

Mr. Wati for Claimant/Petitioner

M/S Ashubwe for 2nd Respondent

Mr. Ongoto for 3rd Respondent

M/S Hellen Ngesa for the Interested Parties

RULING

On 18th December 2012, the Hon. the Chief Justice constituted a bench of three comprising of Justice Nderi Nduma Presiding, Justice Maureen Onyango and Justice Linnet Ndolo to hear and determine HC Petition No.1964 of 2011. The matter was transferred to the Industrial Court on 15th November, 2012 on the basis that, it is vested with exclusive jurisdiction to hear and determine this matter in terms of Article 162(2)(a) as read with Article 165(5)(b) of the Constitution.

The Petitioner on 18th February 2012, filed a Notice of Motion under Rule 24(1) of the Industrial Court (Procedure) Rules 2012 and the inherent powers of the court seeking for an order;

That Honourable Justices Maureen Onyango and Nderi Nduma do disqualify/recuse themselves from hearing the petition/claim herein.

The Application is based on the grounds that Justice Maureen Onyango while working for the Federation of Kenya Employers acted for;

- (i) Musiara Limited in Industrial Cause No.56 of 2006; Kenya Hotels and Allied Workers Union VS Musiara Limited pleaded in paragraph 10 of the statement of claim.
- (ii) Serena Hotels in Industrial Court Cause No.41 of 2007; Kenya Hotels and Allied Workers Union VS Nairobi Serena Hotels pleaded in paragraph 13 of the Statement of Claim.
- (iii) Association of Hotel Keepers & Caterers in Industrial Court Cause No.1269 of 2012; Kenya

Hotels and Allied Workers Union VS Kenya Association of Hotel Keepers & Caterers and 2 Others which case dealt with;

- (a) illegal deduction of service charge
- (b) illegal deduction of agency fee
- (c) illegal registration of Collective Bargaining Agreement against the court orders; matters that are pleaded in paragraphs 18 – 30 of the Statement of Claim.

With respect to Justice Nderi Nduma, it is alleged that whilst working for the Federation of Kenya Employers, he acted for Nairobi Gymkhana in Cause No.90 of 2006 that pitted them against Kenya Hotels and Allied Workers Union. The case is pleaded in paragraph 10 of the Statement of Claim.

In short, the Petitioner argues that since the two judges have at one time or the other acted for its opponents in disputes similar to the one for determination, they are;

- a) necessarily biased against the Petitioner, or
- b) not sufficiently removed from the arena and therefore have a likelihood of prejudice against the petitioner.

All the Respondents oppose the Application for recusal by the petitioner and in particular, state that no specific allegation of bias or likelihood of bias have been made against the two judges in the Notice of Motion itself and the Supporting Affidavit. The Petitioner has therefore failed to show that there is conflict of Interest and/or likelihood of bias or prejudice.

That the application is dilatory and only aimed at wasting the court's time in a matter that has seen two separate panels constituted by the Chief Justice. That it is now asking for too much from the Chief Justice to yet constitute a different bench to resolve the dispute.

It is trite law that a party must stand or fall on its pleadings. We have perused the grounds in support of the Notice of Motion and the Supporting Affidavit and have not found a single allegation alleging bias, or semblance of it by the two judges against the Petitioner.

The only averments made with respect to Justice Nduma is that he at one time acted for Nairobi Gymkhana in Cause No.90 of 2006, which pitted it against the Petitioner. It is not alleged that the said Nairobi Gymkhana is a party to this suit or in any way connected to the specific matters for determination.

Indeed, in the words of the petitioner, the issues for determination are;

- (i) illegal deduction of service charge, agency fee and registration of Collective Bargaining Agreement against the orders of the court.

We have perused the entire amended Statement of Claim dated the 30th December 2011 and found a reference to the Industrial Court Cause No.90 of 2006 – Kenya Hotels and Allied Workers Union Vs Nairobi Gymkhana in paragraphs 10(d)(i) as one of the several cases in which the Industrial Court resolved a recognition dispute in favour of the petitioner. None of the Respondents in the present petition was a party to the cited case in which Justice Nduma participated for the Nairobi Gymkhana Club, whilst he worked for the Federation of Kenya Employers.

With respect to the matters Justice Maureen Onyango is said to have handled, the same argument applies. Firstly she was an employee of the Federation of Kenya Employers and had no personal relationship with any of the parties she acted for therein. The main issue in all the cases cited was a factual and legal determination as to which was the rightful union to represent the interests of the

employees employed by the various corporates engaged in hotel industry. In the capacity of counsel, Justice Maureen Onyango was completely removed from the dispute in question and merely made presentations on behalf of her employer, Federation of Kenya Employers.

We have considered the various authorities presented by the Claimant as follows;

We wish to distinguish HCC Case No.331 of 2001, Trust Bank Limited Versus Midco, Int.(K) Ltd and 4 Others for the following reasons;

The Honourable Justice N.R.O. Ombija had personally acted for the Plaintiff when he was in private practice and neither the judge nor the plaintiff's advocates on record disclosed the matter before the same was heard and determined. The judge found in favour of the plaintiff Bank.

Justice Mohamed K. Ibrahim while reviewing and setting aside the said judgment outlined the test for recusal as follows in the matter;

"..... 3 was there a real danger of bias on the part of the judge due to his relationship with the Respondent and was there a possibility of bias?"

4. *were there sufficient grounds to establish the actuality of bias?*

5. *was there an existence of a conflict of interest even though neither the judge nor the Applicant did raise the matter for consideration?"*

The judge held as follows;

"I do consequently hold that as a result of the aforesaid non-disclosure of the past

Relationship between the judge and the Respondent, the Applicant was denied the opportunity to raise the issue or apply for disqualification on the grounds of prejudice and/or bias -----".

The House of Lords in the case of R.V. Gough (1993) 2 All E.R. 724 held that;

"Except where a person acting in a judicial capacity had a direct pecuniary interest in the outcome of the proceedings when the court would assume bias and automatically disqualify him from adjudication, the test applied in all cases of apparent bias ----- was whether, having regard to the relevant circumstances there was a real danger of bias on the relevant member of tribunal in question in the sense that he might unfairly regard or have unfairly regarded with favour or disfavor the case of a party to the same issue under consideration by him."

In the present case, there is no direct pecuniary interest in the outcome of the proceedings. The only allegation being that the previous employer, Federation of Kenya Employers of Justice Nderi Nduma and Justice Maureen Onyango had the various employer organizations in the past cases cited as its members and the two judges had acted for them before the Industrial Court against the Petitioner. The judges having moved on are not beholden to the instructions given to their employer at the material time they acted in those matters.

The judges have no relationship or friendship with any of the parties in this matter nor have any reason to be hostile to the petitioner by fact of having worked for the Federation of Kenya Employers. The petitioner has therefore, completely failed to establish existence of a conflict of interest or any real or perceived danger of bias against the petitioner by the judges.

As stated earlier, the parties in this suit have many matters at the Industrial Court and many more are expected in future. Indeed they have variously in the recent past appeared before Justice Nderi Nduma and Justice Maureen Onyango without raising any objections. If we were to concede to the request by the petitioner, the Industrial Court would be much the poorer and would result in frustration of

administration of justice in this court. Furthermore, the two judges have since duly taken oath of office to serve as judges of this court without fear or favour, ill will or affection and treat all parties before them equally. The judges have sworn to uphold the Constitution of the Land and have absolute fidelity to the law and not other mistress.

Having considered all the circumstances of this case, we have no doubt that we shall hear and determine all the factual, legal and Constitutional issues before us without any bias and/or undue regard to any of the parties.

We therefore, find that the Application for recusal of the two judges has no merit and is hereby dismissed. The matter will take its normal course.

It is so ordered

Dated and delivered in Nairobi this 22nd day of April, 2013.

Hon. Justice Mathews Nderi Nduma

PRESIDING JUDGE

Hon. Justice Maureen Onyango

JUDGE

Hon. Justice Linnet Ndolo

JUDGE