



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NO 160 of 2011

(Before: D.K.N.Marete)

REGINALD NJAGI NYAGACLAIMANT

Versus

FRENCH EMBASSY NAIROBIRESPONDENT

RULING

On 5th August, 2013, this application by way of a Notice of Motion sworn on 2nd August, 2013 was brought to court. It seeks the following orders of court;

- 1. THAT** the trial JUDGE HON. JUDGE D.K.N. MARETE do disqualify himself from hearing the review of this case and any other proceedings in this matter.
- 2. THAT** this case be allocated another trial judge.
- 3. THAT** the cost of this application be in the course.

It is grounded on the following;

- 1.** The applicant lacks confidence on how the proceedings in this case have been conducted especially on the hearing clay.
- 2. THAT** it would be impracticable for the same judge who gave misleading judgement to accept to give a different ruling in the application for review.
- 3.** It would be in the interest of justice that the applicant feels that justice has been done to him.
- 4. THAT** during the hearing of this case I adduced my evidence which included and of which the judge failed to consider and was not captured in the proceedings:
 - a. THAT** the cheque signed through coercion was sighed on 2th of May 2005 which was almost one and half month **after** the termination of employment had been effected and therefore it was not possible for someone to sign this cheque freely since the action of termination had already taken place. (see MC page 5).
 - b. THAT** I only accepted the cheque of Ksh 226985.65 out of the financial difficulties that I was experiencing at the time and had no any other option but did not accept it as the final dues owed

to me by the respondent.

- c. **THAT** there was no arithmetic basis of how Ksh.226,985.65 was reached on.
- d. **THAT** the writing of this note was dictated to me by the respondent and was not from me.
- e. **THAT** I was paid a half month salary for the month of April 2005 without any given reason, basis or given any audience at all (see MC age 4)
- f. **THAT** the respondent did not pay me the:-
 - i. Payments in lieu of notice
 - ii. Payments due to house allowance since I was employed
 - iii. Payments due to my leave allowance since I was employed
 - iv. Service payments for the years worked (see MC page 1 to 4)
 - v. Medical allowance
 - vi. Damages for unlawful termination.
- g. **THAT** the letter dated 8th March 2005 and marked (MRFE1) in the memorandum of response informed me about facing out cinematheque on 15th March 2005 and as a result my position would cease to exist as from the 15th April 2005. The I was required to leave office (cinematheque) with my leave days fully exhausted for any given direction from the respondent after 15th of April 2005.
- h. **THAT** in the above letter respondent deliberately sneaked in the word EMPLOYMENT in place of the word position and the word EMBASSY in place of the word office (Cinematheque) so that the original meaning of this letter could change in order to favour the respondent in the judgement and that it would mean as a notice of employment termination (see MR paragraph 7b)
- i. **THAT** I was employed with two positions **Technician** and **Factotum** (see MC page 1) and so the factotum position was left after the abolition of the Technician position, since the respondent was specific in this letter about which position ceased to exist even in the certificate of service dated 3rd March 2005 (see MRFE 1)
- j. **THAT** it was the position that I was occupying that ceased to exist but not the termination of employment.
- k. **THAT** I was also employed as a factotum which included any other general work which I was doing diligently and continued to exit.
- l. **THAT** I was employed by the French Embassy but not the Cinematheque which was just a section of the Embassy.

5. **THAT** after the closing of the proceeding a judgement was scheduled for 21st February 2013

6. **THAT** one of the reasons the judge dismissed my case was that he held that I filed my claim on November 2011 thereby holding that I was statue bared while it is clear on record that I filed this claim on 9th February, 2011 within the required timeframe

7. **THAT** in the circumstance, it is clear that the judge deliberately misdirected himself on the day I filed

the claim only to deny me justice.

8. THAT further to the delay, the judge said in respect to the respondent Advocate “**Mr. Michuki each your client about laws. This case is the most complicated case since I joined labour relation services because everything is validated and calculated from 2005 upto now, I don’t know why some employers don’t know how to relate with their employees, I can ask the court to send officers to reach them about labour relations.**”

9. THAT in the above circumstance it was clear that I had succeeded in my claim.

10. THAT I applied and paid up for the proceeding and judgement of the case which was only given a month later and the reasons given for the delay was that the Honourable Judge was having a file himself raising more suspicion.

11. THAT to my surprise and to complicate matters more the typed judgment was completely different from the verbal judgement that was delivered.

12. THAT if it was a demonstration of a case of redundancy as the Hon Judge assumed in the judgement then why did they not follow the laws of redundancy.

13. THAT it is only suspect what would make a judge verbally deliver a different judgement and issues a different version in the typed certified copy.

14. THAT further, the proceedings given are not detailed and only shown dates and coram and not show what transpired on the specific dates, this raising doubt why the judge would fail to make proper proceedings (attached and marked ‘RNN1’ is a copy of the proceedings and RNN2 is a copy of the judgement).

15. THAT it will only be fare and just to have the application for review be heard by a different judge for me to see justice done and seen to be done.

16. THAT I swear this affidavit in good faith as all I need is justice to be seen to be done.

17. THAT all what is deponed to hereinabove is true to the best of my knowledge, information and belief.

The Respondent opposes the application and

4. THAT on 20th February 2013, we received a notice of delivery of Judgment asking both parties to attend court on 21 February 2013 at 2.30 P.M for the delivery of the judgment. I annex hereto a copy of the notice marked DMM 1.

And entirely comes out as follows;

5. THAT on 21st of February 2013, I sent my pupil by name Dennis Mutethia to request a counsel to hold brief for me on the delivery of Judgment. Mr. Mutethia informed me that he requested one Mr. Njuguna to hold my brief and get the Judgment for me.

6. THAT I am further informed by Mr. Mutethia which information I verily believe to be true that when the matter was called out, the claimant was present in person and the judgement was delivered in an open Court.

From the onset, one realizes that this is an application by way of Notice of Motion but this is sworn but not dated and signed. This is irregular and not procedural.

Secondly, the entire embodiment of the application, dubbed GROUND, is fallacious in that it is not in any

way supportive of the application but instead is an attempt of retrial through the back door. These are issues that can only be raised and addressed at an appeal and one not sustainable in the circumstances.

An application for disqualification of a judge on other judicial office should be strict as a matter of fact. It should be categorical on the applicant's apprehension that there is a possibility, or at all, of not getting a just decision due to a considerable possibility of bias on the part of the court/judge. This is not the case here, or in the least. Instead, the applicant involves in a wild goose chase that is not useful to the course of action. It is an appeal in disguise. This court cannot sit on an appeal of its own decisions as this is untenable practice.

I therefore feel inclined to dismiss this application but in the circumstances make an order as to costs.

Dated, delivered and signed the 9th day of October, 2013.

D.K.Njagi Marete

JUDGE

Appearances

1. Claimant in person.
2. Mr. David Muthee Michuki instructed by A.F. Gross & Company Advocates for the Respondent