



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 1430 of 2012**

**PETER MWAURA KAMAU..... 1<sup>ST</sup>**  
**CLAIMANT**

**GEOFFREY IRUNGU MEMIA..... 2<sup>ND</sup>**  
**CLAIMANT**

**STEPHEN NDUNGU NGANGA..... 3<sup>RD</sup>**  
**CLAIMANT**

**AND**

**WICKS MWETHI NJENGA ..... 1<sup>ST</sup>**  
**RESPONDENT**

**REGISTRAR TRADE UNIONS ..... 2<sup>ND</sup> RESPONDENT**

**KENYA UNION OF POST PRIMARY EDUCATION TEACHERS (KUPPET).....INTERESTED PARTY**

**RULING**

The application before court is the one dated 31<sup>st</sup> October 2012. The application is brought by way of Notice of Motion under Section 12(1), (7), 2007 Act. Inherent powers of court, Article 159 (2d) of the Constitution of Kenya (2010) and all other enabling provisions of law. The applicant sought orders that:

1. THAT this application be certified urgent.
2. THAT service of this application be dispensed within the 1<sup>st</sup> instance.
3. THAT the presiding judge herein, (Lady Justice Hellen Wasilwa) be pleased to disqualify herself from presiding, hearing and determining this matter, Cause No.1325 of 2011, Cause No.980 of 2012, and/or any other matter/case filed by the applicants, (Interested party/1<sup>st</sup> Respondent) or against them.
4. THAT cost of this application be provided for.

The application is grounded on the sworn affidavit of Wicks Mwethi Njenga and on the following grounds:

- (a) THAT the presiding judge herein (Lady Justice Hellen Wasilwa) is biased against the 1<sup>st</sup> Respondent and the Interested Party.
- (b) That the said Judge cannot deliver a fair and just judgment against the applicant.
- (c) THAT the said Judge is ready to frustrate a fair judgment against the 1<sup>st</sup> Respondent and the Interested Party.
- (d) THAT the applicants are apprehensive that they will not receive a fair judgment of justice in court of Hon. Lady Justice Hellen Wasilwa.
- (e) THAT the 1<sup>st</sup> Respondent and the Interested Party/Applicants are not comfortable with the presiding Judge Hon. Justice Hellen Wasilwa, hence the aforesaid matter be heard by other judges save her.
- (f) THAT there shall be a miscarriage of justice if the aforesaid matters are heard and determined by the said Lady Justice Hellen Wasilwa.
- (g) THAT it is fair and in the interest of justice if the said judge disqualifies herself, from hearing all cases relating to the Interested Party and the 1<sup>st</sup> Respondent herein.

The application from the onset seems to be brought under unclear provisions of law having been brought under Section (12 (1) (7) 2007 Act which is a nonexistent law. That notwithstanding, I have considered the applicants contentions. The applicants have averred in their affidavit that they believe that I am biased against the current officials of KUPPET especially the deponent Wicks Mwehi Njenga for reasons unknown. They deponent avers that I have been biased in my judgment in this case among others and they believe I will still be biased in this matter. They have cited cause No. 315 of 2009 which was handled by Hon. Justice Madzayo as he then was and who issued an order on 8<sup>th</sup> April, 2010. Purportedly then as Court Registrar I declined to sign the said order. Apparently the deponent avers that he inquired at my offices then as to why I had not signed the said order and I indicated that I could not sign orders made *ex parte* as they were issued improperly. They also cite Cause no.167/2011 where Justice Rika on 5<sup>th</sup> August, 2011 ordered that the Registrar forward the order to the Criminal Investigation Department for investigation of one Peter Mwaura Kamau and I apparently declined because the said Peter Mwaura Kamau is apparently known to me. They aver that apparently the said file is in my custody to date. The applicants apparently indicate that I have been biased against them as Registrar having been influenced by undisclosed claimant. They further aver that a particular file was apparently placed before me when I was on court vacation and I proceeded to issue orders against KUPPET freezing their bank account. The deponent avers that it was in his personal knowledge that the applicants had apparently been assured by me that they would get orders prayed in their application. The place and time where I made this assurance is not disclosed.

The applicants further aver that one Leonard Rufus Ochieng is a close friend of mine, his wife having been my class mate but at which point in time is not disclosed. Apparently the said Rufus has been boasting that he is the one who has influenced me to make orders against the deponent. They even aver that all cases on KUPPET are handled by myself when there are other judges who can hear the said cases. They aver that Cause No.1430/12 was scheduled to be heard in court No.8 on 18<sup>th</sup> September 2012, but was at the instigation of the claimants re-allocated to court No.6 before my court. All the averments of the applicants relate to my alleged bias against the Applicants and favouritism towards their opponents. The applicants contend that they are unlikely to get any justice before me due to these alleged perceived biases. This application was expected to be served on parties; it was going to affect especially those with cases pending before court involving these parties.

The Respondent on his part while opposing this application submitted that this is a court of law and issues must be supported by evidence. They pointed out that paragraph 11 of the affidavit allegedly refers to one Zadock Kisenya who has not sworn any affidavit to confirm the issues. On orders not signed, the

Respondent indicate that there are no letters shown that the court was asked to extract those orders and declined. On Causes No.1325/11 and 980/12, the Respondents submit that the causes have already been determined and there is no application for appeal nor review indicating that the Respondents were satisfied with the said application. There is also no indication that this court directed the matters of KUPPET be heard before this court.

The Respondent further submitted that a Litigant cannot choose a Judge to hear his matter. They submit that the application is an afterthought to delay the hearing of this case and frustrate the claimants accordingly. They asked court to rely on Republic Vs Mwalulu & 8 others CA at Nairobi CA No. NAI 310 of 2004 (189/2004 UR) and dismiss this application.

Mr. Mwangi for claimants in Cause o.1325/2011 on the other hand relied on affidavit filed in the application dated 2<sup>nd</sup> August, 2012 in Cause No.1325/2011. They submit that orders sought herein should not affect Cause No.1325/2011. They submit that good practice demands that a court cannot handle matters not in court. He submitted that in fact Cause no.1325/2011 was settled by a consent recorded in the matter and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in 1325/2011, the current applicants were ably represented. The consent was recorded by Justice Madzayo. They therefore submit that Cause 1325/2011 was concluded and cannot be revived through back door. They submit that the applicants have alleged bias even in cases this court never determined.

On allegations made in the affidavit of Wicks Njenga, Mr. Mwangi submitted that there are no affidavits of people making the allegations as Wicks just depones he was told and all these remain as hearsay evidence concerning the order made in 8/4/2011 which this court refused to sign and is still pending signature to date, he submitted that it has not been indicated efforts applicants have made to have it signed or any correspondence with the court on the same. They submit the issues do not relate to integrity of this court and there is no ground to warrant disqualifications. While citing Republic Vs Mwalulu and 8 others, he submitted that the test is objective and the issue is not whether applicants are comfortable or not and luxury of shopping for a judge are not available.

Having heard submissions of the parties, the issue for determination is whether the submissions by the applicants herein meet the test to warrant disqualification. The objective test for any Judge to disqualify himself or herself was set out in the case of Republic Vs Mwalulu and 8 Others ICA (2005) KLR where JJ Omolo, Tunoi and Deverell held that;

***“(1) when the courts are faced with such proceedings for the disqualification of a judge, it is necessary to consider whether there is a reasonable ground for assuring the possibility of bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of administration of justice. The test is objective and facts constituting bias must be specifically alleged and established.***

***(2) In such cases the courts must carefully scrutinise the affidavits on either side remembering that when some Litigants lose their cases, 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, magistrate or tribunal.***

***(3) The court dealing with the issue of disqualification is not; indeed it cannot go into the question of whether the officer is or will actually be biased. All the court can do is to carefully examine the facts which are alleged to show bias and from those draw an inference as any reasonable and fair-minded person would do, that the judge is biased or is likely to be biased.***

***(4) The single fact that a judge has sat on many cases involving one party cannot be sufficient reason for that judge to disqualify himself...”***

This same proportion has been applied in the Divorce Cause 154 of 2008 (2011) eKLR – RPMVPM by Justice G.B.M. Kariuki, SC where he declined to disqualify himself in an application before him and he had this to say:-

***“All judges like Caesar’s wife should be above suspicion. But it would be chaotic if all allegations of bias, whether buttressed with sufficient grounds or whether baseless were to be said to be sufficient to disqualify a judge from hearing a matter”.***

In the current application, I must say that the allegations when considered are not based on proof or evidence. The deponent has made wild allegations which he says he was told by other people who have not made their own affidavits. One case cited No. 315N/2009 does not relate to the parties herein.

Without going into the truths or otherwise of the allegations, I find that they are not proved. The biases expressed stem from the fact that I as the Registrar failed to sign some order and there is no indication that I was actually asked to extract the said order and sign it. In any case this court had 3 officers who could sign orders, one Registrar and 2 Deputy Registrars and why the other two could not sign the alleged order is not explained. I may add that concerning the parties, I am alleged to have a personal relationship; that is a mere allegation as those parties are unknown to me. Cause 1430/12 came before Hon. Lady Justice Ndolo on 18<sup>th</sup> September, 2012 when she was duty Judge and she directed that it proceeds before me on 4<sup>th</sup> October, 2012. How I influenced her to move the file to me when I was on vacation is not explained. How I influenced her to move the file to me when I was on vacation is not explained.

I do not want to lose sight of the fact that loosing Litigants might be inclined to attribute their lose to an alleged bias by the presiding judge. As Tunoi JA points out in the Mwalulu case;

***“it is these considerations that have led to injunctions such as that judges ought not to be too ready to disqualify themselves lest there be no judge available to deal with certain type of case, particularly those involving parties who are constantly in the courts over one sort of dispute or another”.***

The applicants herein have indeed been in and out of court. Going by their pleadings, they have numerous files in court ranging from leadership wrangles to misappropriation of funds of the Union in question. That in a span of 1 year about 5 different cases involving the same parties have been cited in these pleadings is an indication that the parties have a problem that needs to be resolved. They are actually Vexatious Litigants and they would want to be in court every other time.

I want to say that I am a judicial officer of high moral character with impeachable integrity. I want to allay the fears of the applicants and assure them that I am not and will not be biased against them or any other person. I have no personal or any other interest in the matter before me. I find no reason to disqualify myself. I therefore dismiss this application with costs to the Respondents and the Interested Parties.

Signed, dated and delivered in court at Nairobi this 14<sup>th</sup> day of December, 2012.

**HELLEN WASILWA  
JUDGE**

Appearances:

Mr. Mariaria Advocate	for Applicants
Mr. Mwangi Advocate	for Respondent (Cause 1325/2011)
Mr. Uduol	for Claimant Respondent
Rachel Gichuki	Court Clerk