



**Horticulture And Allied Workers Unions & 10 others v Omulama; Okumu & another (Interested Parties) (Cause E033 of 2021) [2022] KEELRC 3908 (KLR) (16 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3908 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
CAUSE E033 OF 2021  
DKN MARETE, J  
SEPTEMBER 16, 2022**

**BETWEEN**

**HORTICULTURE AND ALLIED WORKERS UNIONS ..... 1<sup>ST</sup> APPLICANT  
ISSA WAFULA WERUKHA ..... 2<sup>ND</sup> APPLICANT  
PETER WANJALA PALANGA ..... 3<sup>RD</sup> APPLICANT  
DOMINIC OGIRE MOMANYI ..... 4<sup>TH</sup> APPLICANT  
BERNARD MUKAISI ..... 5<sup>TH</sup> APPLICANT  
ANDRE MUSIKO NANDI ..... 6<sup>TH</sup> APPLICANT  
ONESMUS KARANJA ..... 7<sup>TH</sup> APPLICANT  
EFELI NANDI ..... 8<sup>TH</sup> APPLICANT  
MARY NYAMBURA ..... 9<sup>TH</sup> APPLICANT  
EUNICE MUTHONI ..... 10<sup>TH</sup> APPLICANT  
CAROLYNE KHATIVINI OKUTU ..... 11<sup>TH</sup> APPLICANT**

**AND**

**DAVID BENEDICT OMULAMA ..... RESPONDENT**

**AND**

**PRESIDING OFFICER (EDWIN OKUMU ..... INTERESTED PARTY**

**REGISTRAR OF TRADE UNIONS ..... INTERESTED PARTY**



## RULING

1. This is an application by way of notice of motion dated November 29, 2021 and seeks the following orders of court;
  1. That honourable judge, Justice DK Njagi Marete, do recuse himself from this matter.
  2. The matter be transferred to the Employment and Labour Relations Court at Nakuru for hearing and determination.
2. It is grounded as follows;
  1. The honourable judge has demonstrated manifest bias in the way he has handled this matter.
  2. The applicants have lost confidence in the court since they have already been subjected to great prejudice due to the decisions made by the court and no longer believe they will be accorded a fair hearing.
  3. The honourable judge has failed to observe fairness and impartiality.
  4. The honourable judge has granted interim orders in the matter at the expense of the applicants without the respondent demonstrating any prejudice they are likely to suffer.
  5. The honourable judge has completely failed to uphold the rule of law but has rather been influenced by emotions.
  6. The honourable judge has failed to safeguard the right of equality before the law, and the right of equal protection, and benefit of the law, without bias or prejudice as a mandatory requirement under regulation 15 of the [Judicial Service \(Code of Conduct and Ethics\) Regulations, 2020](#).
  7. The honourable judge has failed to perform his judicial, and administrative duties, competently, diligently, promptly, and without favoritism as provided under regulation 16 of the [Judicial Service \(Code of Conduct and Ethics\) Regulations, 2020](#).
  8. The honourable court has the power to order the transfer of this case to the court with concurrent and competent jurisdiction to hear and determine the matter.
  9. No party will suffer prejudice if this application is allowed.
  10. The application is made in the interests of justice.
3. The applicants/respondent in their written submission dated March 8, 2022 come out as follows;

The regulation at regulation 7 (e) provide thus;

  7. A judge shall exercise judicial authority independently and shall-
    - (e) exercise judicial function without being influenced by personal feelings, prejudice, or bias.

Regulation 21(d) which is the operating regulation provides as follows;

19.



- (1) A judge may recuse himself or herself in any proceedings in which his or her impartiality might reasonably be questioned where the judge-
  - (d) has actual bias or prejudice concerning a party;

These have been abrogated

- "15. The applicants have in the supporting affidavit sworn by Issa Wafula Werukha on November 29, 2021 at paragraph 5 stated that they believe the honourable judge failed to uphold the rule of law and was influenced by emotions, failed to safeguard the right of equality before the law and the right of equal protection and benefit of the law, without bias or prejudice as a mandatory under regulation 15, failed to perform his judicial and administrative duties competently, diligently and without favoritism and finally elicited a perception of bias."
4. The applicants submit that based on the reason enlisted at paragraph 6 of the replying affidavit, the court elicited a perception of bias that meets the threshold of recusal. This comes out as;
    - "20. Your Lordship you did issue directions that parties appear before you on July 1, 2021. The applicants had not filed any document as the court vide its order dated June 29, 2021 setting the matter for inter-parties hearing on July 1, 2021, did not direct the applicants to file any responses. The information contained at paragraph 18 of Mr Omulama's affidavit is therefore false and amounts to perjury. The applicants requested for (3) three days within which to file a response in opposition to the grant of interim orders. The court granted an interim order whose effect was to stay the decision of the Registrar of political parties to effect changes to the register of officials of the union. Considering the fact the interim order was granted when no respondent in the main suit had filed any document, the said orders are equivalent to *ex-parte* orders.
    28. The respondent boldly avers at paragraph 20 of his affidavit that he believes out of his own knowledge that he was going to suffer prejudice if the interim orders had not been granted without annexing any evidence. In short, your lordship relies on conjecture as opposed to evidence in giving the claimant orders. The claimant upon whom the obligation is placed by the law to establish a prima facie case and prejudice to be suffered, purports to shift such obligation to the applicants in the same paragraph by stating that the court would have endorsed unknown results and actions not demonstrated by the Registrar of Trade Unions. This is an absurdity that your Lordship entertained and continue to entertain up to date.
5. The claimant/respondent answers the application vide his grounds of opposition dated March 2, 2022 which comes out as follows;
    1. That, the notice of motion application dated November 29, 2021 does not meet the threshold of principles for recusal of a judge or member of a tribunal



pursuant to the provisions under *Judicial Service (Code of Conduct and Ethics) Regulations, 2020*.

2. That, the notice of motion is frivolous, vexations and an abuse of court process.
  3. That, the notice of motion is but a front for forum shopping disguised as an application for recusal.
  4. That, the notice of motion application is an afterthought only aimed at delaying determination of the suit as the applicants have submitted to the court hence should be dismissed with costs to the applicants herein.
6. The claimant/respondent in his written submissions dated April 21, 2022 moves on to establish a case in opposition to the application as follows.

"16. The applicants sought time to digest, consult and make a report to court in twenty minutes. After engagement, parties reported back to court and the following consent orders were recorded by the court;

- i) The parties on their own consent are agreed on dialogue in seven to fourteen days with a view to resolving the issue(s) of how the union can be facilitated to go and manage its affairs in the intervening period.
- ii) Interim orders of July 1, 2021 shall remain in place as extended on July 21, 2021.
- iii) Mention on August 19, 2021 before the duty judge for a report and record of settlement.
- iv) The parties be and are at liberty to apply.

17. It is the submission of the claimants that parties were unable to make progress within the time given for negotiations. To-date no agreement has been reached by parties and this information has been placed before the honourable court leading to the court's directions for filing of these submissions.

It is on record that Mr Nderitu appeared for the Registrar of Trade unions on July 21, 2021 and although he alleged that the prayers sought had been overtaken by events, this position was vehemently denied by the claimant/respondent and the Hon judge did inquire from him whether there was any evidence of any action by the Registrar of Trade Unions and no such evidence was availed to the court by the AG or anybody else at that time. Without any evidence at the time, we submit that the court could not have agreed to any action alleged to have been undertaken by the Registrar of Trade Unions without any affidavit and documents filed by the Registrar of trade Unions.

8. The claimant/respondent further seeks to buttress his case on the following submissions;

"20. It is further the claimant's submission that to date the registrar of trade unions has not filed any affidavit in response to the claimant's application and suit and hence any document filed in court and alleged to have originated from the



registrar of trade unions cannot be admitted as an authentic document signed by the registrar of trade unions without an affidavit sworn by the registrar of trade unions to attest to the authenticity of such document. The claimant humbly urges the court to take judicial notice of the fact that pleadings in the main suit have closed and the claimants have already filed and served their submissions in suit. Further, we urge with humility that the court notes that the applicants have not filed their submissions since they were served more than five months ago.

As such, it is the humble submission of the claimant that the honourable judge conducted himself judiciously and with a lot of patience before granting interim orders as the applicants had by that time failed to furnish the court with any material evidence to support their objection to issuance of interim orders.

... under section 17 of the *Employment and Labour Relations Court (Procedure) Rules, 2016*, the applicants had an opportunity to file an application for review of the interim order either to vary it or set it aside. Indeed, they filed an application for review of the interim orders but unfortunately, the honourable court did not have time to hear and determine the same as fast as the applicants wished due to the fact that by July 30, 2021 the honourable court was proceeding for August recess and the honourable judge would not be at his station until February 2022.

21. Further, on July 30, 2021, before the application for review could be heard, the parties by their own consent agreed to engage in dialogue with a view to having the matter resolved out of court and to facilitate the union to operate. To this end, the court issued the following orders/directions;
  - i) The parties on their consent are agreed on dialogue in seven to fourteen days with a view to resolving the issue(s) of how the union can be facilitated to go and manage its affairs in the intervening period.
  - ii) Interim orders of 1st July shall remain in place as extended on July 21, 2021.
  - iii) Mention on August 19, 2021 before the duty Judge for a report and record of settlement.
  - iv) The parties be and are at liberty to apply.

Again,

24. ..., flowing from the chronology of events obtaining from when the claimant filed the suit to the time the court granted the interim orders and the events thereafter, it is the claimant's humble submission that no material facts have been set out in the instant application as evidence of the honourable judge's alleged contravention of the *Judicial Service (Code of Conduct and Ethics) Regulations, 2020*, either by anything said or done during proceedings; or by any specified offence of omission or commission.



9. He raises the following issues for determination;
- i) Whether the Honourable Judge DK Njagi should recuse himself from hearing the case.
  - ii) Whether the honorable court has jurisdiction to hear and determine the suit.
10. This is conjecture. The interim orders were issued at preliminary stage. This is procedural and fair. The applicant should have come in to seek vacation or setting aside of these orders in the appropriate forum. He absconded his application for review of the said orders.
11. This is an application for recusal of the judge and not one on the merits or demerits of the interim orders on the application. What is required of the applicant is a demonstration of the misconduct and misdeeds of the court to the satisfaction of the long established threshold for recusal. This court's position is that the interim orders or other ongoing applications would not suffice in support of such recusal. A case of bias must be clearly established. He seeks to buttress his case in opposition to the application by relying on the following authorities;
- “ 44. In the case of *Philip K Tunoi & another v Judicial Service Commission & another* [2016] eKLR as was cited in *Charity Muthoni Gitabi v Joseph Gichangi Gitabi (Substituted by) Michael Wachira Gitabi* [2017] eKLR, the Court of Appeal in considering an application for recusal stated;
- “In Tumaini v R (supra) Mwakasendo J held, rightly in our view, that
- “in considering the possibility of bias, it is not the mind of the judge which is considered but the impression given to reasonable people.....
- The House of Lords held in *R v Gough* [1993] AC 646 that the test to be applied in all cases of apparent bias was the same, whether being applied by the judge during the trial or by the Court of Appeal when considering the matter on appeal, namely whether in all the circumstances of the case, there appeared to be a real danger of bias, concerning the member of the tribunal in question so that justice required that the decision should not stand.
- The test in *R v Gough* was subsequently adjusted by the House of Lords in *Porter v Magill* [2002] 1 ALL ER 465 when the House of Lords opined that the words “a real danger” in the test served no useful purpose and accordingly held that-
- “(The question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”
12. Is the application for recusal sustainable? No. The applicant is hell-bent on raising all sorts of spurious allegations against the court. They are, overall, not even interested in prosecuting their defense to fruition. There were numerous opportunities offered by court to finalize the matter but these were squandered in favour of acrimony and convolution. This is sad for due process in and the administration of justice.



13. Justice is multi-pronged. It is not the province of a single party to litigation. In the instant case, there are four parties to this suit. It is the onus of the court to balance their various interests and afford them an opportunity to openly present their respective cases in time and space. This, the court has done in the midst of lots of hostility, insult and ridicule on the part of the applicant.
14. The applicant cannot be afforded an opportunity to create a crisis and allowed to reap on it. This would be injustice borne out of intimidation. Litigation is not necessarily noise making, drama, intrigue and chaos in the courtroom. Indeed, courts should beware of such spectacles and nib them in the bud.
15. Here, we witness a situation where a party, in disregard of basic courtesy and borne out of a bloated sense of entitlement makes attempts to hold the court into ransom. Even with numerous awards for a prosecution of their matter, the applicants choose the intrigues of recusal instead of taking up the opportunity to submit to a conclusion of their litigation. This is mischief.
16. A judge is public property. He does not operate on the basis of like or dislike by any party or parties to litigation. His is to dispense justice to parties in litigation through conventional practices and the rule of law. Woe unto them who imagine that judges are material for intimidation through vitriol, drama and shouting.
17. The upshot of all this is that the applicant has not in the least demonstrated a case of bias or any other wrongdoing by the court. They do not appreciate that indeed, they have been the stumbler to an expeditious determination of this matter. And for all this, condemnation is directed to an innocent party, the court. This is sad.
18. The claimant/respondent has in all discounted a case for recusal and transfer by a preponderance of evidence. His case carries the day.
19. I am therefore inclined to dismiss the application with costs to the claimant/respondent.

**DATED AND DELIVERED AT NYERI THIS 16<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

**DK NJAGI MARETE**

**JUDGE**

**Appearances**

1. Mr Magimbo instructed by JGS Law-LLP for the 1st – 11th applicants.
2. Mr Omulama for the claimant/respondent.
3. Mr Okumu for the 1st interested party.
4. No appearance for the 2nd interested party.

