



REPUBLIC OF KENYA



KENYA LAW
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**Esevwe v University of Nairobi (Cause E458 of 2022)
[2023] KEELRC 413 (KLR) (15 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 413 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E458 OF 2022
JK GAKERI, J
FEBRUARY 15, 2023**

BETWEEN

FRANK ESEVWE CLAIMANT

AND

UNIVERSITY OF NAIROBI RESPONDENT

RULING

1. Before the court for determination is a Notice of Motion dated November 16, 2022 by the Claimant filed under Certificate of Urgency seeking Orders That;
 1. The Hon (Mr) Justice Dr Jacob Gakeri does recuse himself from any further conduct of this matter and the file be referred to the Hon Presiding Judge of the Employment and Labour Relations Court for re-allocation and directions on the conduct and disposal of the Review Application and main suit.
 2. The cost of the Application be in the cause.
2. The Application is expressed under Section 12, 20 of the *Employment and Labour Relations Court Act*, Rule 14(9)(10) of the *Employment and Labour Relations (Procedure) Rules, 2016* and all other enabling provisions of law and is based on the grounds set out on its face and the Supporting Affidavit sworn by Frank Esevwe who deposes that in its ruling delivered on October 27, 2022, the court expressed bias at paragraph 66 by stating that the suit had no chances of survival and the court was thus not impartial by stating that the unilateral reduction of an employee's salary did not amount to irreparable damage and loss.
3. That the matter was then fixed for hearing of the main suit.
4. The affiant deposes that he had become aware that the Hon Judge was still an employee of the Respondent and should have recused himself from the matter.



5. That it was improper for a court to handle a matter involving employees when the Judge's Curriculum in the public domain showed that he had been a lecturer at the Respondent from 1993 to date.
6. That the Judge's finding that the prayers in ELRC 511 of 2016 and the current suit are similar, was wrong and biased in that in the earlier suit, he was seeking harmonization of housing allowance with the *CBA* in place then while the current suit seeks to set aside a Memo by the Respondent dated June 21, 2022 purporting to effect a non-existent court order.
7. That the Claimant had lost confidence in the court's independence and ability to conduct a fair hearing and was apprehensive that the court's mind was already made up at the preliminary stage without hearing the parties on merit which was prejudicial to the Claimant/Applicant.
8. That the Judge's conduct violated the standards of conduct enacted in 2020 and dated May 26, 2020 and in particular Regulation 21 Part II that a Judge can recuse him/herself in any proceedings in which his or her impartiality might reasonably be questioned;
 - (a) ...
 - (b) ...
 - (c) ...
 - (d) Has actual bias or prejudice concerning a party.
 - (e) Has a personal interest or is in a relationship with a person who has a personal interest in the outcome of the matter.
9. The affiant also relied on Regulation 9(1) of the Code of Conduct on impartiality and objectivity.
10. That the Hon. Judge should recuse himself in the interests of justice and the matter be determined by another judge free from bias or pre-determined views and who had confidence of all the parties.
11. That the application was not motivated by personal gain or ill will against the judge.
12. When the matter came up for the hearing of the application, the Applicant and the Respondent made short oral submissions.
13. The applicant relied on the grounds and Supporting Affidavit and the annexures.
14. Mr Omondi for the Respondent opposed the application stating that he received the application on December 14, 2022 though filed in November 2022, and had not responded. Counsel argued that the applicant had raised issues that were *res judicata* and was forum shopping and the application had been brought in bad faith and on wild allegations to vex the court not to do its work in accordance with the Constitution and the law, an abuse of court process as the applicant had litigated the matter before Mwaure J who had dismissed it. Counsel prayed for the application to be struck out as the applicant had already made an application for review of the ruling.
15. Finally, counsel argued that the annexures to the application were obtained illegally.

Determination

16. The singular issue for determination is whether the application dated November 16, 2022 is merited.



17. The gravamen of the Claimant's application for recusal is that the Hon Judge demonstrated bias or impartiality and was an employee of the University of Nairobi to date. In the former, the impugned words are as follows;

“ However, in light of the decision in ELRC Cause No 511 of 2016, the probability of success is doubtful”
18. The foregoing statement was made in the context of the totality of the documentary evidence before the court and in particular the findings of Mbaru J in ELRC Cause No 511 of 2016.
19. The court is, however, persuaded by the applicant that the statement could be construed as a pre-determined mind even though it does not expressly state so.
20. As regards the Hon. Judge having been and being an employee of the Respondent, the applicant relied on an undated Curriculum Vitae (CV) extracted from the internet as well as two printed pages containing the Judge's undated passport size photograph and qualifications, physical address and email.
21. The documents reveal that the Hon. Judge is listed as a Senior Lecturer, Faculty of Law, University of Nairobi. None of the documents relied upon indicate that the Hon Judge is an active Senior Lecturer at the Respondent or a caption of his status at the School of Law of the Respondent.
22. While it is true that the Hon Judge has been an employee of the University of Nairobi since the 1990s after graduating with the LLM degree in 1993 and served the institution on full-time basis until December 2014 and on part time basis until 2021 when he was appointed Hon Judge of the Employment and Labour Relations Court, the Hon Judge is no longer an employee of the institution and has not rendered any form of service to the Respondent or received any payment since appointment as Hon. Judge.
23. When the Hon Judge enquired from the applicant as to whether he had approached the Respondent's Finance Department or the School of Law to ascertain whether indeed the Hon Judge was still serving the Respondent institution, the applicant responded in the negative.
24. Significantly, while the applicant has the right to seek recusal of the Honourable Judge, it behoved him to research and furnish cogent evidence in support of the allegations relied upon.
25. To allege that the Hon Judge, (a State Officer) is working for two government entities at the same time which is contrary to the Constitution of Kenya, 2010 without substantiating the allegation is unfair to the Hon Judge.
26. Needless to emphasize, the Hon Judge has heard and conclusively determined cases involving employees of the Respondent.
27. However, the court takes cognizance of the applicant's averment that the application herein was not motivated by personal gain or ill-will against the Hon Judge and the matter rests there.
28. Having considered the pleadings and heard both the Applicant and counsel for the Respondent on the matter and in light of the foregoing, the court is satisfied that application should be granted in the interest of justice being seen to be done consistent with the adage that justice must not only be done but must manifestly be seen to be done.
29. Needless to emphasize, justice belong to the people as opposed to courts of law weighed against the allegations made against the court.



30. The court is guided by the East Africa Court of Justice decision in *Attorney General of Kenya v Peter Anyang Nyong'o & 10 others* EACJ App No 5 of 2007 as well as the Supreme Court of Canada decision in *R v S* (RD) 1977 3 SCR 484. In the latter, the court stated as follows;

“The apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person viewing the matter realistically and practically and having thought the matter through conclude. This test contains two-fold objective elements; the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further, the reasonable person must be an informed person. The jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts the threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence.”

31. The foregoing, often referred to “reasonable apprehension of bias” test was adopted with approval by a 7-Judge Bench of the Court of Appeal in *Hon (Lady) Justice Kalpana H Rawal v Judicial Service Commission and 2 others & others* [2016] eKLR.

32. The court is persuaded that the applicant has demonstrated reasonable apprehension of bias.

33. In conclusion, the Application dated November 16, 2016 is allowed as prayed and the Hon Judge hereby recuses himself from handling the matter.

34. The file be placed before the Principal Judge for directions on disposal of the Application for review dated November 16, 2022 and main suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 15TH DAY OF DECEMBER 2022

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

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