

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

MISCELLANEOUS APPLICATION NO. 185 OF 2023

OMARI BAKARI LIYANGA 1ST APPLICANT

SAID KASIMU KILUKE 2ND APPLICANT

EPIPHANIA NGONYANI 3RD APPLICANT

VERSUS

MSAJILI WA VYAMA VYA

WAFANYAKAZI NA WAAJIRI 1ST RESPONDENT

MWANASHERIA MKUU WA SERIKALI 2ND RESPONDENT

CHAMA CHA WAFANYAKAZI WA

HUDUMA ZA JAMII TANZANIA (TASIWU) 3RD RESPONDENT

RULING

Date of Last Order: 24/08/2023

Date of Ruling: 22/09/2023

B.E.K. Mganga, J

On 30th June 2023, applicants filed this application seeking the court to set aside the decision of the Registrar of Workers Organizations and Employment Association dated 11th February 2022. When the application was called on for hearing on 14th August 2023, Mr. Joseph

Basheka, Personal Representative of the applicants, submitted that I should recuse from handling this application. Reasons advanced by Mr. Basheka, personal representative of the applicants are that, previously I handled Miscellaneous Application No. 291 of 2022 between the parties in which applicants were seeking leave of the court to issue prerogative orders. It was submitted by Mr. Basheka that the court raised a legal issue and asked the parties to address whether it was properly filed or not and at the end, the said Miscellaneous Application was struck out for being incompetent. Mr. Basheka submitted that, applicants believe that this court will not do justice to them because they informed him that on the last hearing date, parties were ordered that on the next hearing date they should address the court on competence of the application at hand specifically whether the provisions of section 57 of the Employment and Labour Relations Act [Cap. 366 R.E. 2019), and Rules 29, 30 and 31 of the Labour Court Rules, GN. No. 106 of 2007 were complied with or not. Based on that information, Mr. Basheka submitted that I should recuse to handle this application because applicants believes that I will not do justice to them.

Ms. Lightness Msuya, learned State Attorney for the 1st and 2nd respondent resisted the prayer submitting that there is no justification

for recusal. She submitted further that the court may at any stage, raise a legal issue and ask the parties to make submissions. She added that the mere fact that in the previous application the court raised a legal issue that resulted into the application by the applicants to be struck out cannot be a ground for recusal of a judge. She concluded that the court should proceed with hearing of the application.

On his side, Mr. Evans Nzowa, learned advocate for the 3rd respondent submitted that when the court is hearing an application, it must first, satisfy itself whether it has jurisdiction or whether the matter is properly before it. Learned counsel for the 3rd respondent submitted further that when the court raises any issue of law, it is the duty of the parties to satisfy the court whether the matter is properly before it. He added that, that cannot be a ground to ask the judge to recuse from determining the application. Counsel for the 3rd respondent concluded that there is no reason justifying recusal of the judge in the application at hand.

In rejoinder, Mr. Basheka, the personal representative of the applicants maintained that, since applicants have no faith or confidence with the judge, then, the judge must recuse. In his submissions, Mr. Basheka conceded that prayers in the application at hand are different

from the ones in Miscellaneous application No. 291 of 2022. He also conceded that the court has powers to raise legal issues and that in Miscellaneous Application No. 291 of 2022, the parties were afforded right to submit on the issues raised by the court and that in the application at hand, the parties were informed off record that on the date of hearing, the parties should address the court on competence of the application based on the provisions of section 57 of Cap. 366 R.E. 2019(supra) and Rules 29, 30 and 31 of GN. No. 106 of 2007(supra). He submitted further that in informing the parties in advance, the court did not intend to take the parties by surprise and wanted them to have a meaningful submission. He concluded that, once there is a prayer for a judge to recuse, then, the judge should give benefit of doubt to the parties and recuse from hearing the matter.

It is clear from submissions by Mr. Basheka, the personal representative of the applicants that applicants are worried with my impartiality simply because in Miscellaneous application No. 291 of 2022, I raised a legal issue and asked the parties to make submissions thereon and that at the end the said application was struck out. Their worry is that, by asking the parties to prepare themselves so that on the date of hearing they can submit on competence of the application at hand

based on the afore cited provisions, justice will not be done to them. It seems to the applicants and their personal representative that the court is precluded to raise legal issues other than those raise the parties and that if it happens that the court raises legal issue, then, it becomes biased. In other words, in the view of the applicants, the court should just continue to determine the matter as filed by the parties without satisfying itself as to its competence. That assumption or view cannot be valid because, the court is not like a sponge that can absorb both dirty and clean water at the time of cleaning the floor without choosing. In my view, always and for proper determination of the matter before it, the court must at first, satisfy itself whether it has jurisdiction over the matter and whether the matter is properly before it. Once it is satisfied that it has jurisdiction and that the matter is properly before it, then, it will proceed to determine it. It is my view that, if the court does not ask itself whether it has jurisdiction over the matter or whether, the matter is properly before it, the danger is that, it may proceed to determine the matter which it has no jurisdiction with or the matter that was improperly filed. The result is that, any decision arising therefrom may be a nullity.

It was correctly submitted by counsel for the 1st and 2nd respondents and 3rd respondent on one hand and correctly conceded by Mr. Basheka during rejoinder submissions that this court has powers and can raise any legal issues and ask the parties to make submissions thereon. That is the correct position of the law. In the case of [Charles Christopher Humphrey Kombe t/a Kombe Building Materials vs Kinondoni Municipal Council](#) (Civil Appeal 19 of 2017) [2022] TZCA 205 the Court of Appeal held *inter-alia* that: -

"Accordingly, the learned trial judge cannot be said to have committed any wrong in framing a new or additional issue which he thought necessary for determining the matter before him since the law permitted him to do so. The issue is whether after having framed an additional issue the trial judge afforded an opportunity to the parties to address him on that aspect."

It is clear from the above quoted decision of the Court of Appeal that, a judicial officer can raise an issue suo motu when he/she finds that it is necessary to do so but should give the parties an opportunity to address him on that aspect. In the application at hand, applicants complained that in Miscellaneous application No. 291 of 2022, I raised a legal issue and gave them an opportunity to make submissions thereof and that based on the issue raised by the court, the said application was found to be incompetent and consequently was struck out. In the application at hand, applicants are fearing the same results. It is my

view, as correctly submitted by learned counsel for the respondents that, there is no justification or reasons for myself to recuse from handling this application. I am of that view because, parties were afforded right to submit on the issues that were raised by the court in Miscellaneous Application No. 291 of 2022. Again, in the application at hand, as was correctly submitted by Mr. Basheka, the personal representative of the applicants that the court asked the parties to prepare themselves in line of the cited provisions so that they can submit on competence of the application. In other words, as was correctly submitted by Mr. Basheka, the court did not want to take the parties by surprise. In my view, that cannot be a ground for recusal of a judicial officer.

The Court of Appeal had an advantage to discuss in the case [Golden Globe International Services & Another vs Millicom Tanzania N.V & Another](#) (Civil Application 195 of 2017) [2017] TZCA 193 as what will be a good or sufficient reason for recusal of a judicial officer when it held:-

*"Recusal or disqualification is a tenet of the law intending to promote the fundamental principle of Judicial impartiality and confidence in the administration of justice... We said that in order for the judge to disqualify himself/herself there must be sufficient convincing reasons before he/she disqualifies himself from a suit...**It is always tempting for a judge against whom criticism are made to say that he would prefer not***

to hear further proceedings in which the critic is involved. It is tempting to take that course because the judge will know that the Critic is likely to go away with sense of grievance if the decision is going against him. Rightly or wrongly, a litigant who does not have confidence in the judge who hear the case will feel that, if he loses, he is in some way been discriminated against. But it is important for the judge to resist the temptations to recuse himself simply because it would be more comfortable to do so ... It is our considered view that it would be an abduction of judicial function and encouragement of spurious application for judicial officer to adopt the approach that he/she should disqualify himself or herself whenever requested to do so on application of one of the parties."

The above quoted holding of the Court of Appeal has nailed it to the fullest that, for a judicial officer to recuse himself from handling the matter, there must be convincing reasons and that, recusal just to give comfort to the parties, is abdication of judicial duties. From where I am standing, I am not prepared to abdicate judicial duties because as I have pointed hereinabove, it is part of my duties, before embarking on the merit of the application, to satisfy myself that I have jurisdiction and that, the application was properly filed before the court. It is my view that, applicants are praying that I should recuse from hearing this application based on flimsy reasons. In my view, accede to the prayer by the applicants, will amount to abdication of judicial duties because there are no good or sufficient reasons advanced by the applicant warranting my recusal.

My position of not recusing from handling this application is further fortified by the provisions of Rule 9(1) and (2) of the Code of Conduct and Ethics for Judicial Officers, 2020, G.N. No. 1001 of 2020.

The said Rule provides: -

9.-(1) A judicial officer shall disqualify himself in any case in which that judicial officer:

- (a) believes he will be unable to adjudicate impartially;*
- (b) believes that a reasonable, fair minded and informed person, would have a reasonable suspicion of conflict between a judicial officer's personal interest or that of a judicial officer's immediate family and his judicial functions;*
- (c) has a personal bias or prejudice concerning a party or personal knowledge or facts;*
- (d) served as a lawyer in a matter in controversy or a lawyer with whom he previously practised law served during such association as a lawyer concerning the matter or the judicial officer or such lawyer has been a material witness in the matter;*

(2) Disqualification is not appropriate if:

- (a) the matter giving rise to the perception of a possibility of conflict is trifling or would not support a plausible argument in favour of disqualification; or***
- (b) no other judicial officer can deal with the case or because of urgent circumstances, failure to act could lead to a miscarriage of justice;*
- (c) upon disclosure of the ground(s) of intended recusal by the judicial officer, the parties agree that the judicial officer may participate in the proceedings. The consent by the parties or their representatives shall be recorded and shall form part of the record of proceedings.*

(Emphasis is mine)

From what I have discussed herein above, I am of the settled view that, grounds for recusal advanced by Mr. Basheka on behalf of the applicants are unimportant and improbable. The likelihood is that applicants are praying my recusal as a forum shopping expedition. Prayer for recusal of judicial officer as a forum shopping cannot be allowed. See case [Golden Globe International Services & Another vs Millicom Tanzania N.V & Another](#) (supra). That said and done, I hereby hold that there is no ground for recusal. I will therefore proceed to hear the application at hand.

Dated at Dar es Salaam on this 22nd September 2023.



B. E. K. Mganga
JUDGE

Ruling delivered on 22nd September 2023 in chambers in the presence of Mr. Joseph Basheka, Personal representative of the Applicants and Joyce Yonaz, State Attorney for the 1st and 2nd Respondents and Evans Nzowa, Advocate for the 3rd Respondent.



B. E. K. Mganga
JUDGE

