



Were (As Legal Representative of Peter Ouma Onyango - Deceased) v Karlsson (Arbitration Cause E015 of 2023) [2023] KEHC 21132 (KLR) (Commercial and Tax) (30 May 2023) (Ruling)

Neutral citation: [2023] KEHC 21132 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
ARBITRATION CAUSE E015 OF 2023**

DAS MAJANJA, J

MAY 30, 2023

BETWEEN

ROSE NYALWENGE WERE (AS LEGAL REPRESENTATIVE OF PETER OUMA ONYANGO - DECEASED) APPLICANT

AND

MATS KARLSSON RESPONDENT

RULING

1. The Respondent has filed a notice of motion dated May 16, 2023 seeking an order that, “Hon. Mr. Justice D. S. Majanja disqualifies himself from hearing this suit in which his impartiality might reasonably be questioned.” The application is supported by the affidavit of Jeff Kimata, the advocate acting for the Respondent, sworn on the same date. It is opposed by the Applicant through the affidavit of her advocate, Tatyana Ondijo, sworn on May 22, 2023. The application was urged through oral submissions by counsel for the parties along the lines set out in their depositions.
2. The principal ground set out in the respondent’s deposition is that the law firm of Kimata Alutira and Company Advocates, acting for the Respondent lodged a complaint against the Judge at the Judicial Service Commission (“the Commission”). The complaint dated January 24, 2023 related to NRB HCCC No. E027 of 2018, Globecast Africa Limited and Wananchi Group Limited v Wananchi Programming Limited (“the Complaint”). The Complaint was duly acknowledged by the Commission by the letter dated January 31, 2023.
3. The Respondent urges that the Complaint may give rise to a reasonable apprehension, in the mind of reasonable, fair minded and informed members of the public that the Judge will not apply his mind to the case impartially. The Respondent contends that the Judges direct and personal interest in the Complaint gives rise to a situation of a conflict of interest in the case where the Judge’s impartiality and fairness is called into question and his independence impugned since he will not be able to decide



the case in accordance with the Constitution without favour, bias, affection, ill-will, prejudice or other influence. He states that the allowing the Judge to decide the case would violate the Respondent's constitutional right to a fair trial by an independent and impartial court. Counsel emphasized that the Respondent's right to be represented by counsel of his choice will also be violated if the Judge does not recuse himself.

4. The Applicant opposes the application on the basis that the court has conducted itself and handled the matter in a professional and dignified manner and that the Respondent has not demonstrated that there is a real danger that a fair trial is likely to be denied. The Applicant points out the Complaint made to the Commission does not emanate from these proceedings or relate to the parties before this court in this case. It urges the court to dismiss the application as there is no evidence to support the case for recusal.
5. The application before the court is for recusal. Judges are obliged to sit and hear cases hence they must not recuse themselves on flimsy or bare allegations made by a party as this would undermine the administration of justice. Apart from the duty to sit and hear cases, there is a presumption of impartiality in favour of every judge and judicial officer. Every judge and judicial officer takes an oath in accordance with the Constitution to apply the Constitution and the law, 'impartially and without fear, favour or prejudice' and to 'administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law' thus an application bears the burden of disproving this presumption by tangible evidence (see Bernet v ABSA Bank Ltd 2011 (3) SA 92 (CC)).
6. The authorities are therefore clear that there must be a factual basis for the Judge to recuse himself. In Jan Bonde Nielson v Herman Philipus Steyn & 2 others HC COMM No. 332 of 2010 [2014] eKLR the Court of Appeal observed that:

The appropriate test to be applied in determining an application for disqualification of a Judge from presiding over a suit was laid down by the Court of Appeal in R v David Makali and others C.a Criminal Application No Nai 4 And 5 of 1995 (unreported), and reinforced in subsequent cases. See R v Jackson Mwalulu & others C.A. Civil Application No Nai 310 of 2004 (Unreported) where the Court of Appeal stated that:

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

7. In Philip K. Tunoi and Another v Judicial Service Commission & Another CA Civil Application NAI No. 6 of 2016 [2016] eKLR the Court of Appeal adopted the test for recusal explained in Porter v Magill [2002] 1 All ER 465 that, “The question is whether the fair minded and informed observer, having considered the facts, would conclude that was a real possibility that the tribunal was biased.” The Court of Appeal concluded that an applicant must specifically establish the facts alleged in the application for recusal of a judge and that those facts must lead the general public to doubt the fair administration of justice. In short, the test is objective and not subjective.
8. The respondent calls in aid the Judicial Service (Code of Conduct and Ethics) Regulations 2020 dated May 26, 2020 which is the code of conduct governing the conduct of Judges and Judicial Officer (“the Code”). Regulations 21 Part II of the Code, a Judge can recuse himself or herself in any of the proceedings in which his or her impartiality might reasonably be questioned where the Judge;
 - a) Is a party to the proceedings



- b) Was, or is a material witness in the matter in controversy;
 - c) Has personal knowledge of disputed evidentiary facts concerning the proceedings;
 - 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;
 - f) Had previously acted as a counsel for the party in the same matter;
 - g) Is precluded from hearing the matter on account of any other sufficient reason; or
 - h) Or a member of the Judge's family has economic or other interest in the outcome of the matter in question.
9. In addition, Regulation 9 of the Code emphasizes the importance of impartiality of a Judge. Regulation 9(1) provides:

A Judge shall, at all times, carry out the duties of the office with impartiality and objectively in accordance with articles 10, 27, 73(2)(b) and 232 of *the Constitution* and shall not practice favouritism, nepotism, tribalism, cronyism, religious and cultural bias, or engage in corrupt or unethical practices.

10. In this case, the issue is whether a Judge should recuse himself on the basis of a complaint against him lodged by an Advocate acting for a party seeking recusal before the Commission. It is not in dispute that the Advocates on record lodged a complaint against the Judge at the Commission. At the plenary hearing, I did inform the parties that the Complaint had since been dismissed by the Commission.
11. I am constrained to reject the Respondent's argument that as I Judge I have any interest in the outcome of this matter based on the Complaint as there is no suggestion that it is related to a case involving the parties before the court in this case. The only common denominator between this case and the case which is subject to the Complaint is that it is the same law firm of Kimara and Alutira Advocates that is involved. It has filed complaints in both cases, yet there is no suggestion, facts or evidence that I as a judge would be biased against the litigants in this case merely because the Advocates have lodged the Complaint. Applying the test for recusal to these facts, I find and hold that no reasonable person, fully aware of the facts and nature of the Complaint, would come to the conclusion that the court would be biased against the parties.
12. The major plank of the applicant's case is that I should recuse myself on account of a Complaint pending or otherwise before the Commission. The mere fact of a pending complaint cannot be the basis for recusal as this would open the door for forum shopping as parties to lodge complaints against judges and on that basis seek recusal. In *Ansar v Lloyds TSB Bank* [2006] EWCA Civ 1462 cited with approval by the court in *Re Daniel Bernard Hefti (Deceased)* [2020]eKLR the court emphasized that the a mere complaint against a judge or judicial officer cannot give rise to automatic disqualification. The right of every party to complain against or criticize a judge is a fundamental right but the fact of the complaint or criticism cannot of itself lead to disqualification. In *Triodos Bank NV v Dobbs* [2005] EWCA Civ 468, Chadwick LJ., observed as follows:

(7) It is always tempting for a judge against whom criticisms 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 a sense of grievance if the decision goes against him. Rightly or wrongly, a litigant who does not have



confidence in the judge who hears his case will feel that, if he loses, he has in some way been discriminated against. But it is important for a judge to resist the temptation to recuse himself simply because it would be more comfortable to do so. The reason is this. If the judges were to recuse themselves whenever a litigant – whether it be a represented litigant or a litigant in person – criticised them (which sometimes happens not infrequently) we would soon reach the position in which litigants were able to select judges to hear their cases simply by criticising all the judges that they did not want to hear their cases. It would be easy for a litigant to produce a situation in which a judge felt obliged to recuse himself simply because he had been criticised – whether that criticism was justified or not. That would apply, not only to the individual judge, but to all judges in this court; if the criticism is indeed that there is no judge of this court who can give Mr Dobbs a fair hearing because he is criticising the system generally, Mr Dobbs’ appeal could never be heard.

13. Ultimately, the mere existence of a complaint against the judge in a matter totally unrelated to the present matter and without any facts of evidence implicating the judge in any conduct against the advocate that would impede his duties to his client would not lead a reasonable person to conclude that I am biased.
14. I refuse to recuse myself from this matter with the result that I dismiss the application dated 16th May 2023 is dismissed with costs to the Applicant.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF MAY 2023.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Ms Ondijo instructed by J. A. Makau and Company Advocates for the Applicant.

Mr Kimata instructed by Kimata Alutira and Company Advocates for the Respondent.

