



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION No. 197 OF 2020

IN THE MATTER OF ARTICLES 2(4), 10(1), 10(2), 19(3), 20(1), 20(2), 20(3), 20(4), 22(1), 23(1), 23(3), 25(C), 27(1), 27(4), 36(1), 38(1)(b), 38(3)(c), 47, 48, 50(1), 73(1)(a), 73(2)(b), 75(1)(b), 91(1)(b), 232(1)(c), (e) & (f), 258(1) AND 260 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE POLITICAL PARTIES ACT AND FAIR ADMINISTRATIVE ACTIONS ACT

AND

IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS, THE PRINCIPLES OF NATURAL JUSTICE, TRANSPARENCY AND FAIR HEARING

AND

IN THE MATTER OF THE CONTRAVENTION AND/OR THREATENED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER THE CONSTITUTION OF KENYA 2010

FORUM FOR THE RESTORATION OF

DEMOCRACY - KENYA.....PETITIONER

VERSUS

OFFICE OF THE REGISTRAR OF

POLITICAL PARTIES1ST RESPONDENT

ANN N. NDERITU,

REGISTRAR OF POLITICAL PARTIES.....2ND RESPONDENT

AND

DAVID ESELI SIMIYU.....1ST INTERESTED PARTY

WAFULA WAMUNYINYI.....2ND INTERESTED PARTY

RULING

APPLICATION

1. The 1st and 2nd Interested Parties through a Notice of Motion dated 11th November 2020 seek an order for the Honourable Justice J. A. Makau to recuse himself from these proceedings.

2. The application is premised on the ground on the face of the application inter-alia:-

a) The Constitution at Article 50 gives the Applicant a right to fair hearing which includes the right to be heard by an independent and impartial Court.

b) This is a right that cannot be limited or derogated from by virtue of Article 24 of the Constitution.

c) The Applicants have lost confidence in the Court and seek that the Judge recuses himself from these proceedings in order to protect their right to fair hearing before an impartial and independent Court.

d) A reasonable person seized of the facts herein articulated would not be assured that the Applicants would get justice before the Honourable Judge.

e) In view of the facts adumbrated herein and for the ends of justice, it is appropriate that this application be heard and determined expeditiously.

f) It is in the interest of justice that this application be allowed as prayed.

3. The application is further supported by supporting affidavit of Hon. Dr. Eseli Simiyu sworn on 11th November 2020 and annexure thereto.

PETITIONER RESPONSE

4. The Petitioner filed Replying Affidavit sworn by Dr. Susan Wafula on 4th February 2021 supported by annexures thereto.

SUBMISSIONS

5. The Interested Parties filed submissions dated 17th June 2021, whereas the Petitioner filed submission in response dated 21st June 2021 in response to the Interested Parties submissions.

BRIEF FACTS OF THE CASE

6. The Petition herein was filed by Petitioner, a Political Party, in the name of Forum for the Restoration of Democracy – Kenya (*hereinafter “Ford-Kenya”*) The Petition was against the Respondents herein. However the Interested Parties were only enjoined as such in the limited role of an Interested Party in any constitutional Petition. The Petitioner in this Petition is a political Party, which instituted the Petition against the Respondents as primary parties in the suit.

7. The Petitioner at the time of filing the Petition simultaneously filed an application under certificate of urgency seeking Court’s urgent and immediate intervention for reasons, that from part of the Petitioner’s pleadings. The matter was considered ex-parte and Court proceeded to grant an interim conservatory order.

8. The conservatory orders were issued on 15th June 2020 on temporary basis and not permanently. The conservatory orders were to remain in force during the pendency of the application and pending inter-partes hearing of the application.

9. The Interested Parties challenged the jurisdiction of the Court through a Preliminary Objection, to which parties were granted an opportunity to canvass the same through written submissions, which this Court considered and delivered a substantive ruling on 24th September, 2020, which the Court dismissed.

10. The Interested Parties being aggrieved by the Court’s said ruling, proceed to the Court of Appeal with an application for stay; which application the Court of Appeal dismissed on 12th October 2020.

11. Additionally the Petitioner moved this Court under Certificate of Urgency through Notice of Motion dated 2nd November 2020. On 10th November 2020, the matter was mentioned in presence of all parties, who were represented by their respective Advocates. The Court, on issue of whether to issue an Interim Order during the pendency of the Petitioner’s application dated 2nd November 2020; upon hearing parties’ rival submissions, the Court proceeded to deliver its ruling on the same day, which Court did render granting a restraining order.

12. The Interested Parties were aggrieved by the said decision of the Court and proceeded to the Court of Appeal on 16th November 2020 with an application for stay, which application was dismissed by the Court of Appeal.

ANALYSIS AND DETERMINATION

13. Upon consideration of the Application, the Replying Affidavit and rival submissions, I find that two issues arise for consideration:

a) Whether the Interested Party has proven grounds that necessitate the recusal of the Honourable Judge.

b) Who should bear the costs.

A. WHETHER THE INTERESTED PARTY HAS PROVEN GROUNDS THAT NECESSITATE THE RECUSAL OF THE HONOURABLE JUDGE.

14. The Interested Parties contend that the grounds of disqualification or recusal of presiding officers in legal proceedings were stated in the case of **Philip K. Tunoi (supra)** where the Court of Appeal in establishing the standard for disqualification of members of the bench, relied on the case of **Porter v. Magill (2002) 1 ALL ER 465** which stated 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.”

15. The Interested Parties additionally urged, that it is settled law, that not only actual bias but, also a reasonable perception of bias disqualifies a judicial officer from presiding over the judicial proceedings. Once this is established, the disqualification is so complete, that continuing to preside after recusal should have occurred renders the further proceedings a nullity.

16. The Interested Parties asserted that they have made out a case showing, that the learned Judge has shown and/or appeared to be partial and that a fair-minded and informed observer would conclude that there was a real possibility or real danger of bias.

17. It is Interested Parties contention that they have established cogent reasons as articulated in the supporting affidavit to the recusal application and that there are glaring reasons why the judge can be said to be bias by an observer.

18. In response the Petitioner asserted, that the Interested Parties have failed to adduce any evidence that the Judge has in any way, whatsoever been biased in thee proceedings.

19. The Petitioner urged, that it is apparent from the Interested Parties Application that the basis on which they seek recusal of the Honourable Judge, is on the fact that the Petitioner was granted interim ex parte orders on the 15th June, 2020 and further decisions in favour of the Petitioner. It is further Petitioner’s contention, that the Interested Parties are through this disguised recusal application, seeking to challenge the correctness or otherwise of the previous decisions of the trial Court, yet the same Interested Parties have filed appeals to the Court of Appeal, which appellate court is the only proper Appeal forum, where review of his Court’s decision is to be entertained.

20. The Petitioner additionally contends, that in so long as the Appeal is grounded on decision which are pending review before the Court of Appeal in **Nairobi Civil Appeal No. E 496 of 2020**, then any discussion of the same grounds in the recusal application is sub-judice and an abuse of the Court process.

21. It is further Petitioner’s submission that contrary to the express terms of order granted on 15th June, 2021, the Interested Parties have presented the application as through the Court granted permanent conservatory orders. It is trite that the decision to grant or refuse to grant interim order by any Court of law is an issue of judicial discretion and of which is exercised depending on the particular circumstances of each case and therefore the grant of interim orders cannot be read as an evidence of bias at all.

22. In the instant Application, I find no bias evidence proven on the Judge’s part with regard to interim orders granted on 15th June 2020 as alluded to by the Interested Parties, in the Notice of Motion and supporting Affidavit respectively, given that such orders are discretionary and can only subsist on a temporary basis until final determination of the application inter parties. Further to the aforesaid it is trite, that where a party to a suit is dissatisfied with the ex-parte orders or outcome, on decision made in such matter, the party has an opportunity or is at liberty to file an application to set aside such an order or decision or seek review which steps the Interested Parties did not take, in the circumstances of this suit but instead preferred an appeal in respect of orders of 15th June 2020.

23. In view of the aforesaid, I find the Applicants / Interested Parties have not demonstrated any bias / on the Judge’s part and the allegation remain unproven; baseless and unfounded, thus making the application frivolous and vexatious. I further find that reasons for seeking recusal of the Judge by the Interested Parties do not give rise to prejudice as they are baseless.

24. **Rule 5 of the Judicial Code of Conduct**, sets out the circumstance that warrant for recusal as, follows:- Whether a judicial officer has personal biases or prejudice concerning a party before him, had served as a lawyer in the matter in controversy or has close family or financial relation or any interest in the matter. As regards the instant application, the only allegation that the Applicants contended is that there exists bias in exercise of the trial Judge’s judicial discretion. In considering whether a judicial officer exhibits bias the Courts have developed an objective test.

25. The Petitioner on the test applicable placed reliance in the case of **Oloololo Game Ranch Ltd vs. National land Commission & 2 others; Chief Land Registrar & 2 (Interested Parties) (2020) eKLR** where the Court quoted the Court of Appeal in **Kalpana Rawal vs. JSC & Others (2016) eKLR** which set out the test of bias as follows:-

“We think the objective test of reasonable apprehension is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the mind of the reasonable fair minded and informed member of the public that the Judge did not (will not) apply his mind to the case impartially.”

26. It is trite that a litigant who seeks disqualification of a Judge comes to Court because of his own perception, that there is appearance of bias on the part of the Judge, the Court however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair minded about the circumstances of the case. I find there has to be a reasonable ground for assuming possibility of

bias and whether it is likely to induce in mind of the right thinking, well informed and reasonable member of the public reasonable doubt about the fairness of the administration of justice.

27. While Justice Mohamed W. Kullow was dealing with similar issue reliance was placed in *Oloololo Game Ranch Ltd (supra)* where quoting the Supreme Court of Kenya in *Gladys Boss Shollei vs. The JSC and Another (2018) eKLR* which had cited the Authority of *Simonsen vs. General Motor Corporation USDCP 425 RSupp574,578 (1978)* in which the Court stated:-

“Recusal and reassignment is not a matter to be lightly undertaken by a distinct Judge, while in proper cases, we have a duty to recuse ourselves, in case such as the one before us, we have concomitant obligation not to recuse ourselves; absent valid reasons for recusal their remains what has been termed as a “duty to sit”.

From the above it is clear that the requirement of independence and impartiality of judge must be counterbalanced by the judge’s duty to sit where no grounds of disqualification exists in fact or in law as the duty in itself helps to protect the independence of our courts against manoeuvring by parties hoping to improve their chances of having a matter determined by a particular judge as to gain forensic and strategic advantage through delay and interpretation of proceedings as was pointed by the Supreme Court in the holding by the New Zealand Court of Appeal in *Mnir vs. Commissioner of Inland Revenue (2007) 3NZLR 495.*”

28. In the instant application I find that no reasonable cause has been put forward or advanced by Interested Parties as to why the Judge should recuse himself from hearing the Petition herein. In the case of *Mama Millers Limited vs. Sunrise Synthetic Limited (2020) eKLR* it was held that:-

“It is evident that there are various issues that need to be considered in a matter calling for the recusal of a Judge. It is not in doubt that the Applicant has a right to call for the recusal of a judicial officer on apprehension of bias. However, the said apprehension must be a reasonable one. See the case of *President of Republic of South Africa vs. The South African Rugby Football Union & others CASE CCT16/98* where the court relied on the case of *Committee for Justice and Liberty et al vs National Energy Board* and held that:

“...the apprehension of bias must be reasonable one held by a reasonable and right-minded person applying themselves to the question and obtaining thereon the required on formation...the test is what would an informed person, viewing the matter realistically and practically and having thought the matter through conclude.”

It was further stated;

“An unfounded and unreasonable apprehension concerning a Judicial Officer is not a justifiable basis for such application. The apprehension of the reasonable person must be assessed in the light of the true facts as they emerge at the hearing of the Application.” (Emphasis added)

29. I now turn to determine whether the apprehension that the Judge is not impartial and that he is biased and against Interested Parties has any justification. The standard required in such matters is that the mind of a reasonable person should be applied to determine whether there is an apprehension of bias. In the instant suit, it turns out that the Interested Parties are dissatisfied with the Judge’s decision in proceedings to grant the exparte order of 15th, June, 2020, as well as, the ruling on the Preliminary Objection. In view of the said rulings the remedy for Interested Parties lies with appeal and / or seeking review of the aforesaid decision.

30. The Petitioner placed reliance on the above proposition in case of *Mama Millers Limited vs. Sunrise Synthetic Limited (2020) eKLR* where Justice L. Gacheru quoted the case of *Miller v Miller (1988) KLR 555* where the Court of Appeal held that:-

“No party should be placed in a position where he can choose his Court... It would be disastrous if the practice was that once there are allegations made against a Judge and the judges Honour is in question, that Judge must disqualify himself. The Administration of justice through Court would be adversely affected since mischievous parties to cases would obtain disqualification by judges with ease and the consequence would be a choice of trial of a Judge by a party.”

31. Further Justice L. Gacheru in *Mama Millers Limited (supra)* further quoted the case of *Anyang Nyongo & others (2007) IEA 12* where the Court held that:-

“The Court must guard against litigants who all too often blame their losses in Court cases to bias on the part of the Judge.”

32. Having considered the rival affidavits and upon perusal of the Court’s decision and Court record, it is evident from the Interested Parties application, that the same is without basis as they are blaming their loss in Court on the Judge, and of which blame, I have found to be baseless, unfounded and should be rejected. I find that it is clear the Applicant’s are laying baseless claims of bias which are not backed by any evidence. The same remain frivolous and vexatious, and are put out to tarnish the image of the Judge simply because the decision was not favourable to the Interested Parties.

33. I find without doubt, that the allegations raised by the Interested Parties in their Recusal Application do not depict any bias whatsoever on the part of the Honourable Judge. The Honourable Judge in denying and/or granting orders and making a decision as depicted in this matter, was exercising his judicial duty to preside over the case as commanded by the Constitution. I find that the allegation of bias alluded to by the Interested Parties and their call for recusal of the Honourable Judge is only because they are displeased with the decisions made by the trial Judge, and which is not sufficient evidence of bias on the Court’s part and for justification for Court’s recusal.

34. In the case of *Engen Kenya Limited vs Rukan Limited (2020) eKLR* Justice L. Gacheru while dismissing an application of recusal based on the allegations that ex-parte orders were granted by the Judge thus depicting bias on his part opined that:-

“In this determination, I am not in any way called to defend the judicial decision that I may have exercised in discharge of my judicial authority or discretion as provided in law...The Law is very clear on what should happen should a party be dissatisfied with the Orders of the Court. The party has a right to seek for review or appeal against the said order. The Applicant did none of the above. Instead, it chose to apply for my recusal just because I extended the ex-parte interim orders.

The Applicant has alleged that there is reasonable apprehension that I might not apply my mind clearly to this matter and that is because I extended the Interim Orders and which extension is provided for by the law.

Even though the Applicant has a right to call for recusal of a Judicial Officer, myself included, on apprehension of bias, that apprehension must be a reasonable one...

The Applicant alleged that I have already made up my mind over the dispute because I extended the interim orders. However, extension of the said interim orders was done after consideration of the circumstances of the matter and if the applicant was dissatisfied with the said exercise of judicial discretion, it ought to have appealed the said decision but not to seek for recusal of the Judge handling the matter. The Court finds the Applicant’s apprehensive of bias not reasonable and there is no evidence of such bias.

The Applicant has not demonstrated any evidence of partiality or biasness by the Court in the extension of existing interim orders. If dissatisfied with the said orders, the Applicant ought to have sought for review or appeal of the same.

In any event, the Applicant herein has not lost the case because this dispute is still at the interlocutory stage.”

35. Having considered the application and response as well as authorities relied upon, I find that the Interested Parties, have failed to adduce evidence and proven grounds to necessitate the recusal of the Judge in this matter. The allegation against the Judge are without basis, are frivolous, vexatious and only intended to tarnish the Judge’s record for having issued decision not favourable to the Interested Parties and in issuing decision in accordance with the evidence adduced before the Court.

B. WHO SHOULD BEAR THE COSTS.

36. The Petitioner in submitting on issue of costs quoted a number of authorities in support of prayer for costs. Reliance was placed in the case of *Cecilia Karuru Ngayu vs Barclays Bank of Kenya & Another (2016) eKLR* cited the case of *Republic vs Rosemary Wairimu Munene, Ex-parte Applicant vs Ihururu Dairy Farmers Co-operative Society Ltd* where Hon. Justice J. Mativo held that:-

“The issue of costs is the discretion of the Court as provided under the above Section. The basic rule on attribution of costs is that costs follow the event... it is well recognized that the principle costs follow the event is not to be used to penalise the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”

37. Justice John Mativo in *Cecilia Karuru Ngayu (Supra)* further opined that:-

“To my mind, in determining the issue of costs, the Court is entitled to look at inter alia (i) the conduct of the parties, (ii) the subject of litigation, (iii) the circumstances which led to the institution of the proceedings, (iv) the events which eventually led to their termination, (v) the stage at which the proceedings were terminated, (vi) the manner in which they were terminated, (vii) the relations hip between the parties and (viii) the need to promote reconciliation amongst the disputing parties pursuant to Article 159(2) (c) of the Constitution.”

38. It is trite that costs follow the events. The Petitioner has defended and responded to the application herein by the Interested Parties, which application, I have found to be without merits. Accordingly the Petitioner should be awarded costs.

39. The upshot is that the Interested Parties application is without merits, is an abuse of Court process. It is frivolous and vexatious and is dismissed with costs to Petitioner.

40. However as the Constitutional and Human Rights Division has three Judges, and to demonstrate that I have no personal Interest in any matter in this division or any, I will having not recused myself from hearing this matter, refer this matter to the Presiding Judge of the Division to allocate this matter to any other Judge in the Division to hear and determine the same.

Dated, Signed and Delivered at Nairobi on this 29th day of July, 2021.

.....

J. A. MAKAU

JUDGE