



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NUMBER 40 OF 2014

JKN.....APPELLANT

VERSUS

HWN.....RESPONDENT

RULING

1. By way of a notice of motion dated 14/12/2018, JKN (hereinafter the applicant) seeks orders;

1. Spent.

2. THAT the Honourable Trial Court Justice Anthony Ndung'u recuse from this file forthwith, and forward it to Court No. 1 for further directions to facilitate this appellant to access and retrieve the subject ward-Prince for urgent medical and psychological treatment forthwith at the expense of the appellant, and to attend to a special school for mentally challenged as have been recommended by the doctors, psychologist and professionals.

3. THAT the County Children Officer Nyahururu, enjoined by OCS Nyahururu be ordered by the Honourable Court to aid the petitioner access and retrieve the subject ward Prince & Angel for urgent psychological and mental treatment forthwith at the expense of the appellant, as per the "EXISTING COURT ORDERS".

4. THAT costs be in the cause.

2. The gravamen of the appellants case is that the trial judge is in breach of the oath of office, the **Children Act**, the **Marriage Act**, the **Constitution**, the **Judicature Act**, the **Evidence Act** and numerous orders of court issued in the **Nakuru High Court Civil Appeal Number 40/2014**.

3. The appellant is of the view that the trial judge is compromised, has personal interests in the matter, has failed to punish for contempt, is biased, is heartless and indeed the appellant has written complaint letters against the trial judge.

4. The appellant's application is that the judge is unfit to preside over the trial and should recuse himself.

5. The application was served but the record shows that the same elicited no response from the respondent.

6. Earlier in court today, Mr. Mutai counsel holding brief for Mr. Mong'eri who is on record for the respondent indicated that they were not opposed to the instant application.

7. I have had occasion to consider the application, the supporting affidavit and all documents filed.

8. The issue for determination is whether the appellant has placed before the court such material as may justify his apprehension that the judge shall be partial or biased while handling the matter thus denying the appellant the constitutional right to a fair hearing.

9. In our context no less than the constitution ring fences this right. **Article 50(1)** of the **Constitution** provides;

"Article 50

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public

hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

10. If a judge is biased or prejudicial for or against a party or his counsel he cannot be impartial in deciding the case before him and would thus flout the right to a fair hearing enshrined in **Article 50**.
11. A party or counsel who believes such bias or prejudice exists must prove it with tangible evidence and cannot base this belief on mere suspicion or merely on the ground of holding a different view of the law from that of the judge.
12. It is to be appreciated that errors in judicial decisions are expected given the human frailty of the participants in the judicial system who include judges, lawyers and parties.
13. In determining the existence or otherwise of bias, the test to be applied is that of a fair-minded and informed observer who will adopt a balanced approach and will neither be complacent nor be unduly sensitive or suspicious in determining whether or not there is a real possibility of bias.
14. In **PHILIP K. TUNOI vs. JUDICIAL SERVICE COMMISSION 2016, eKLR**, the *Court of Appeal* in considering an application for recusal stated;

“An application for recusal for a judge is a necessary evil. On the one hand it calls into question the fairness of a judge who has sworn to do justice impartially, in accordance with the Constitution without any fear, favour, bias, affection, ill-will, prejudice, political, religious, or other influence. In such applications, the impartiality of the judge is called into question and his independence is impugned. On the other hand, the oath of office notwithstanding, the judge is all too human and above all the Constitution does guarantee all litigants the right to a fair hearing by and independent or impartial judge. When reasonable basis for requesting a judge to recuse himself or herself exists, the application has to be made, unpleasant as it may be. That is the lesser of two evils. The alternative is to risk violating cardinal guarantee of the Constitution, namely, the right to fair trial, upon which the entire judicial edifice is built. Allowing a judge who is reasonably suspected of bias to sit in a matter would be in violation of the constitutional guarantee of a trial by an independent and impartial court...”

An application for recusal of a judge in which actual bias is established on the part of the judge hardly poses any difficulties: the judge must, without more, recuse himself. Such is the situation where a judge is a party to the suit or had a direct financial or proprietary interest in the outcome of the case. In that scenario bias is presumed to exist and the judge is automatically disqualified. The challenge however, arises where, like in the present case, the application is founded on appearance of bias attributable to behavior or conduct of a judge...”

The Court further stated;

“Firstly, it is obvious from the test above that there is no basis for the rather elastic test propounded by Dr. Khaminwa, where a judge must automatically recuse himself or herself upon the making of a mere allegation by any of the parties. On the contrary decisions abound that judges should not recuse themselves on flimsy and baseless allegations.”

The *Court of Appeal* then concluded;

“It cannot be gainsaid that the applicant bears the duty to establish the facts upon which the inference is to be drawn that a fair minded and informed observer will conclude that the judge is biased. It is not enough to just make a bare allegation. Reasonable grounds must be presented from which an inference of bias may be drawn.”

15. The burden of proving that the court might be biased is borne by the applicant.
16. This quote from the **AMERICAN BAR ASSOCIATION JOURNAL VOL. 68 PAGES 1179 -1328** illuminates the position further;

“There must be reasonable balance between the integrity of our judicial system and the rights of a litigant to a fair trial by a fair judge.

A blanket pre-emptory challenge is not the answer because it is not addressed to the bias or impartiality of a judge but simply permits the expression of the subjective feeling, whim and reaction of a litigant or his attorney. No judge should be disqualified without some factual basis being set forth in an affidavit or otherwise. The subjective feeling of an attorney or litigant should not be permitted to undercut the integrity of our judicial system.”

17. In the application before me, the applicant has cited various decisions or positions taken by the court on the matter which went against him and which he does not agree with.
18. The fact that a party or his advocate does not agree with the finding of a court is no good ground for recusal of the judge. Any party who is dissatisfied with the findings of the court has ready remedies through the appellate, review or setting aside mechanisms which are well enshrined in the constitution and relevant statute(s).
19. I have painstakingly gone through all the allegations made by the appellant. He raises a myriad of complaints some outrightly defamatory but which are in my well considered view an expression of his subjective feelings, whim and views and no evidence is adduced to

substantiate the same.

20. A look at the record would show the great lengths to which the court has gone in an attempt to bring closure to this long and unwinding litigation. The appellant on his part appears not to appreciate the distinction between the appellate jurisdiction and the original jurisdiction of the High Court. For that reason, he has gone on and on filing a litany of applications some of which ought to have been filed in the trial court below.

21. In the process, focus on the appeal has been lost. No wonder this court found it necessary to intervene and re-direct the focus in the matter to the prosecution of the appeal and gave concise and firm directions on the prosecution of the appeal and at the same time gave interim orders on the welfare of the children specifically in regard to custody. More importantly, the court directed that the appeal herein was to be determined in any event not later than 28/2/2019.

22. The allegations of bias, compromise, breach of law and others are not borne out of record neither are they demonstrated through tangible evidence.

23. So which way this matter? It is instructive that at stake in this matter are rights of two (2) minors who find themselves as the proverbial grass as two (2) bulls fight.

24. I am enjoined by **Article 53(2)** of the **Constitution** to hold a child's best interests as of paramount importance in every matter concerning a child.

25. **Section 4(2)** of the **Children Act** also requires this court to take the best interests of the child as a primary consideration in all matters affecting a child.

26. Similarly the provisions of **Section 4(3)** of the **Children Act**, which I find necessary to reproduce here require all judicial and administrative institutions and all persons acting in the name of these institutions when dealing with children matters to treat the interest of child as the first and paramount consideration. The Section provides;

“S. 4(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—

(a) safeguard and promote the rights and welfare of the child;

(b) conserve and promote the welfare of the child;

(c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.

27. The best interests of the child in this appeal is to ensure an expeditious prosecution of the appeal to finally determine the custody and maintenance of the children, the subject of the appeal.

28. Since one party has sought the recusal of the trial judge, however unmerited the application may be, I am of the considered view that in order to avoid further delays in the matter either through appeal or other applications related to the issue of suitability of the trial judge, it is in the best interests of the children that I down my tools in this matter.

29. I accordingly proceed to recuse myself from presiding over this appeal. This file shall forthwith be placed before the presiding judge for further directions/re-allocation.

Dated and Delivered at Nakuru this 30th day of January, 2019.

A. K. NDUNG'U

JUDGE