



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 186 OF 2016

EDWARD MWANGI MACHARIA.....APPELLANT/APPLICANT

VERSUS

MAINA & MAINA ADVOCATES.....RESPONDENT

RULING

1. This ruling emanates from the Notice of Motion dated 22nd May, 2019 brought by the appellant/applicant herein and supported by both the grounds set out on its face and the affidavit sworn by the applicant. The applicant is seeking for the following orders:

i. Spent.

ii. THAT the Honourable Mr. Justice J.K. Serгон be pleased to recuse himself from hearing the instant application and subsequent proceedings in the matter.

iii. THAT the file be placed before the Presiding Judge of the Civil Appeals Division for urgent directions regarding further proceedings in the case.

iv. THAT costs of the application be provided for.

2. In response to the Motion, the respondent has filed the replying affidavit of *Gideon Mutai*.

3. In the course of making oral submissions before this court on 30th July, 2019, Mr. *Sabula* learned counsel for the applicant argued that the judge has a personal interest in the matter and therefore the applicant stands to suffer prejudice. The learned advocate cited Article 50 of the Constitution to buttress his argument.

4. Mr. *Wanjeri*, learned advocate for the respondent contended that the applicant has not brought forth any credible evidence to establish bias on the part of the judge neither has he demonstrated that the respondent has in any way influenced this court.

5. I have considered the grounds set out on the face of the Motion, and the facts deponed in the affidavits filed in support and against the application. I have also taken into account oral arguments presented before this court.

6. The brief background of this matter is that sometime in 2015 the respondent filed an Advocate-Client Bill of Costs with the Deputy Registrar. Subsequently, the applicant sought to have the Bill of Costs struck out but his application was dismissed by this court vide the ruling of 18th June, 2015. As a consequence, the Bill of Costs proceeded for taxation and taxed by the taxing officer, Hon. Deputy Registrar Makungu, in the sum of Kshs.232,690/= vide her ruling of 19th November, 2015.

7. Being dissatisfied with the aforesaid rulings, the applicant lodged an appeal to this court, seeking to have those rulings/ orders vacated and set aside. The respondent filed a notice of preliminary objection against the appeal, essentially challenging the competency of the appeal by virtue of the fact that under paragraph 11 of the Advocates (Remuneration) Order, an appeal against the decision of a taxing master cannot lie with the High Court. This court heard the preliminary objection and upheld the same and proceeded to strike out the appeal with costs to the respondent.

8. The subject of recusal of a judge was discussed in depth by the Supreme Court in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2013] eKLR*. The Court sought to define the term in the following manner:

“Recusal, as a general principle, has been much practised in the history of the East African judiciaries, even though its ethical dimensions have not always been taken into account. The term is thus defined in Black’s Law Dictionary, 8th ed. (2004)

[p.1303]:

“Removal of oneself as judge or policy maker in a particular matter, [especially] because of a conflict of interest.”

9. The Supreme Court in the above-cited case went ahead to state that the grounds on which recusal of a judicial officer can be based are relative and vary from one case to another. However, the Court took the following view:

“Perception of fairness, of conviction, of moral authority to hear the matter, is the proper test of whether or not the non-participation of the judicial officer is called for.”

10. The applicant has argued that this court is outrightly biased against him owing to the fact that it has previously issued several orders against him while at the same time favouring the respondent. The applicant further stated that this court has on previous occasions directed the conduct of the matter to the sole convenience of the respondent.

11. The respondent on the other hand has refuted the claim of bias and stated that such allegations have been made without any basis.

12. Having considered the above arguments, the question that then arises is: what constitutes bias? The High Court in **Republic v Independent Electoral & Boundaries Commission & another Ex parte Coalition For Reforms and Democracy (CORD) [2017] eKLR** with reference to the Bangalore Principles on Judicial Conduct reasoned thus:

“Bias or prejudice has been defined as a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to judicial proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind, an attitude or point of view, which sways or colours judgement and renders a judge unable to exercise his or her functions impartially in a particular case. However, this cannot be stated without taking into account the exact nature of the bias.”

13. The court went further to cite the decision rendered by the Constitutional Court of South Africa in **President of the Republic of South Africa v The South African Rugby Football Union & Others Case CCT 16/98** in which it was stated *inter alia* as follows:

“Courts have rightly recognized that there is a presumption that judges will carry out their oath of office...This is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high. However, despite this high threshold, the presumption can be displaced with 'cogent evidence' that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias.”

14. From the foregoing, it is clear that the standard or threshold required for establishing bias is on the higher side, hence any allegation of bias raised by a party ought to be supported by some reasonable form of evidence.

15. In the present instance and from the facts presented by the applicant, I have noted that whereas the applicant has concluded bias and prejudice on the part of this court in handling the matter before it, the applicant has offered no credible evidence in support of such an allegation. As earlier mentioned, the standard for proving bias, whether actual or perceived, would require cogent evidence.

16. The applicant has not set out the particulars of instances where this court has sidelined him while entertaining the respondent. In my view, the allegations have merely been presented in a generalized manner thus running below the set standard.

17. The court in **President of the Republic of South Africa v The South African Rugby Football Union & Others (supra)** held *inter alia* that:

“...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...It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party.”

18. Having considered the material placed before this court together with the oral submissions of learned counsels, I am not persuaded that this court has acted in a biased manner as alleged. There is no credible evidence that shows the existence of bias. If anything, the applicant has not pointed out the instances when this court has ‘ignored’ or ‘refused to listen’ to him while granting the respondent audience or that the respondent somehow influenced this court. The mere fact that the parties have appeared before this court on previous occasions and that in those occasions this court ruled in favour of the respondent cannot by itself amount to bias or impartiality on the part of the court.

19. The applicant has similarly raised the issue of conflict of interest by the court. No evidence has been availed before this court to establish such an allegation, neither has the applicant given the particulars of how the conflict of interest arose. In the circumstances, I have no basis on which to determine that it would be proper for this court to disqualify itself from handling the matter on the basis of conflict of interest.

20. I am of the considered view that the reasons offered by the applicant do not meet the required threshold for recusal of this court. The application is ordered dismissed. In the circumstances of this application, a fair order on costs is to order which I hereby do, that each party meets its own costs.

Dated, Signed and Delivered at Nairobi this 20th day of September, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant/Applicant

..... for the Respondent