REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

ELECTION PETITION NO 10 OF 2017

IN THE MATTER OF THE CONSTITUTION OF KENYA

ELECTIONS *(Parliamentary & County Elections)*

PETITION

HASSAN OMAR HASSAN.....1ST PETITIONER

LINDA MARIWA SHUMA.....2ND PETITIONER

AND

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....1ST RESPONDENT

NANCY WANJIKU KARIUKI.....2ND RESPONDENT

HASSAN ALI JOHO.....3RD RESPONDENT/APPLICANT

R U L I N G

1. By a Notice of Motion dated 8th January, 2018 the Petitioner herein had moved the Court seeking Orders **THAT**:

> 1. This Honourable Court do certify this application as urgent.
>
> 2. This Honourable Court do grant leave to the Petitioners to file this application after the pre-trial conference has been concluded and the hearing of the petition has reached the stage of submission on an application for scrutiny after all the witnesses have testified.
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> 3. That upon grant of the leave sought in prayer 2 above, the presiding judge herein do recuse herself from presiding over this petition and do remit the file to the Chief Justice for purposes of appointing another Judge.

The Application is premised on the grounds **THAT**:

> a. The Presiding Judge had demonstrated open bias against the Petitioners.
>
> b. The Presiding Judge had displayed double standards when treating applications made by the parties herein, by readily accepting to hear and grant those by the Respondents, but refusing to even hear that filed by the Petitioners.

c. The Presiding Judge had given open latitude to the Respondents' advocates when cross-examining the Petitioners and their witnesses, but restricted the Petitioners' advocates when cross-examining the Respondents and their witnesses.

d. The Presiding Judge had demonstrated in Court that she would not grant the Petitioner's application for scrutiny even before the same is heard on the basis of the witnesses' evidence on record.

The Applicant's Case:

2. The application was supported by the Affidavit of Hassan Omar Hassan sworn on 8th January, 2018 in which he relied on the grounds as stated in the application and his letter dated 4th January, 2018.

3. At the hearing, Learned Counsel for the Petitioner Mr. Aboubakar, relied on the Supreme Court decision of Ibrahim SCJ. in **Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2013] eKLR**, wherein reference is made to the case of **Republic v Sussex ex parte M'carthy** where the Court stated that it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.

4. Mr. Aboubakar argued that the test in an application for recusal is whether there is an impression of bias and that disqualification is imperative even in the absence of bias if a reasonable man may infer bias. In support of the application, Counsel cited the following cases:

a. Justice Kalpana H. Rawal v Judicial Service Commission & 3 others [2016] eKLR;

b. Philip K. Tunoi& another v Judicial Service Commission& another [2016] eKLR;

c. Republic v Independent Electoral and Boundaries Commission & 3 others Exparte Wavinya Ndeti [2017] eKLR.

5. Mr. Aboubakar contended that the Court had demonstrated bias by displaying double standards in dealing with the applications before it by readily accepting to hear the Respondent's applications and declining to hear those of the Petitioner. As an example Counsel argued that the Respondents' application to strike out the Petitioner's documents was heard, however the Petitioner's application for summary judgment was not heard. Counsel also took umbrage with the decision of the Court to have the application for scrutiny argued at the end of the trial after witnesses had testified.

6. The Petitioner further accused the Court of giving open latitude to the Respondents while restricting the Petitioner in cross examination. Reference was made to the Court disallowing Counsel for the Petitioner from cross examining the 3rd Respondent on his academic qualifications when the Petitioner had been cross examined on his own academic qualifications.

7. From the foregoing it was Mr. Aboubakar's submission that any reasonable man sitting in Court would have concluded that the Court is biased against his client.

The Respondents' Case:

8. The application was opposed by the 1st and 2nd Respondents. In the Grounds of Objection dated 8th January, 2018 the 1st and 2nd Respondents argued that the Applicant had not presented reasonable grounds for a presumption of bias that would create reasonable doubt in a reasonable person.

9. Mr. Nyamodi, learned counsel for the 1st and 2nd Respondents urged that the application was based on apprehensions by the Petitioner, which apprehensions cannot, without more, form a basis for recusal. He asserted that the application was bad in law, was made in bad faith and was an abuse of the Court process.

10. In addressing the question whether the Applicant had discharged his burden of establishing a presumption of the possibility of bias, Mr. Nyamodi, argued that the letter marked "HOH 1" upon which the application was predicated, made broad allegations which did not establish the facts constituting bias. Counsel cited the case of **Kalpana H. Rawal v Judicial Service Commission & 2 others [2016] eKLR** on who bears the burden of proving the facts upon which an inference of bias may be drawn. He submitted that no basis had been laid for the granting of the application and urged that it be struck out with costs.

11. Counsel also referred to the case of **Justry P. Lumumba v I.E.B.C & 2 Others (2017) eKLR** on specifity on the claims of bias.

12. Mr. Nyamodi in his submissions argued that the test to be applied is an objective one and referred the Court to the case of **Philip K. Tunoi & another v Judicial Service Commission& another [2016] eKLR**.

13. In addressing the question whether the decision of the High Court forms sufficient basis for recusal of the Judge, Mr. Nyamodi submitted that Advocates as officers of the Court are duty bound to assist the Court take charge of the proceedings for proper Court management. He relied on the dictum by Mutuku J in the case of **Abdiwahab Abdullahi Ali v Governor, County Government of Garissa & 2 others [2013] eKLR**, to buttress this position**.**

14. Counsel also made reference to the case of **Kaplan & Stratton v L.Z. Engineering Construction Limited & 2 others [2000] eKLR**, and urged the court not to be too ready to accede to the suggestion of appearance of bias to discourage forum shopping by parties.

The 3rd Respondent's case

15. Learned Counsel for the 3rd Respondent, Mr. Balala cited the case of **Saad Yusuf Saad v Independent Electoral and Boundaries Commission (IEBC) & 2 others [2017] eKLR,** and argued that the test for recusal as set out therein is objective and the facts constituting bias must be specifically pleaded and proved.

16. Mr. Balala submitted that **Rule 15(2)** of the **Election Petition Rules** frowns very indignantly on conduct such as that of the Petitioners and it is for such reason that Prayer 2 of the Application for leave ought to be disallowed.

17. He further submitted that the motion lacks merit for the reasons that the application is wholly founded on the basis that the Petitioners are not impressed by previous Rulings delivered by this Court and that the Petitioners also believe that the decision of the Court dismissing the 3rd Respondent's application seeking to strike out the Petition, had been made only because a Court of Appeal decision tied the Court's hands.

18. Counsel submitted that previous decisions of a judicial officer, or any Court on a particular matter cannot form the basis of recusal as intimated by the Petitioners. He relied on the decision of the English Courts in ***Locabil (UK) Ltd –v- Bayfield Properties Ltd & Another; 2000 1AIIER 65*** in support of this position.

19. Mr. Balala submitted that the Petitioners' application should suffer the inevitable fate of dismissal. This is particularly so because the Petitioners' application for recusal comes at a time when the Court is seized of a second application from the same Petitioners seeking scrutiny which has been denied in an earlier application.

20. He further submitted that the application has not met the threshold of a *"reasonable person"* observing the proceedings, and that no tangible material has been placed before this Court to warrant a recusal. In the circumstances, the Petitioners' application lacks merit and in his view it ought to be dismissed.

Disposition:

21. Indeed, all parties to proceedings are guaranteed the right toan independent and impartial Court in the Constitution. In the event that a litigant is apprehensive that this right may be compromised, an application such as the one before this Court seeking the recusal of the judge is well within the rights of the Petitioner. It is however expected that any party who wishes to apply for a Judge to disqualify themselves from a case, should make a conscientious decision based on real facts which impinge on the ability of the Judge to make an impartial decision in the matter.

22. The Petitioner's complaint as set out in the Application is that the Court has demonstrated bias and the Petitioner has therefore not been accorded a fair hearing in the Petition. In support of the application, the Supporting Affidavit sworn by the Petitioner makes reference to a letter he wrote to his advocate. What the Petitioner laid bare in the annexure were his feelings and his views about the Court in very unflattering language. He is entitled to them. The Court must however look beyond the outburst and examine the claim that the Petitioner has brought in order to establish whether it has any basis or not.

23. I have given due consideration to the Application, the grounds on which it is predicated as well as the rival arguments presented in Court and the authorities cited. The issue that arises for determination is whether the Petitioner has provided justifiable grounds upon which a reasonable observer sitting in Court can conclude that the Judge had demonstrated bias and had impeded the fair hearing of the Petition herein.

24. To address this issue three questions must be answered. The 1st question that begs an answer is who is a reasonable man? In the case of **Philip K. Tunoi & another v Judicial Service Commission & another [2016] eKLR** it was held:

> **"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."**

25. In addressing an allegation of bias, the test is therefore whether a fair-minded and informed observer who adopts a balanced approach would conclude that there is a real possibility of bias. It is difficult to encompass the kind of person from whose depths would spring, the type of letter captioned as 'HOH1' annexed to the supporting affidavit as fitting the description of a "fair minded observer" who had adopted "a balanced approach".

26. The 2nd question to address is what is the test for bias? In the case of **Philip K. Tunoi & Another v Judicial Service Commission & another [supra]**, the Court of Appeal made the following observations regarding bias:

> ***"[39] The House of Lords held in* R v. Gough [1993] AC 646,** ***that the test to be applied in all cases of apparent bias was the same, whether being applied by the Judge during the trial or by the Court of Appeal when considering the matter on appeal, namely whether in all the circumstances of the case, there appeared to be a real danger of bias, concerning the member of the tribunal in question so that justice required that the decision should not stand.***
>
> ***[40] The test in* R v. Gough** ***was subsequently adjusted by the House of Lords in* Porter v. Magill [2002] 1 All ER 465** ***when the House of Lords opined that the words "a real danger" in the test served no useful purpose and accordingly held 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."**

27. At Paragraph 45, the Court of Appeal rendered itself thus:

"[45] In The People case, this Court expressed itself as follows in relation to the application for disqualification of the members of the bench.

"How should Judges treat the subject of disqualification when raised before them?

...when the courts in this country are faced with such proceedings as these, it is necessary to consider whether there is a reasonable ground for assuming the possibility of 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."

28. The Petitioner contended that the Court had demonstrated bias by displaying double standards in dealing with the applications filed by the Respondents and readily accepting to hear the Respondents' applications and declining to hear those of the Petitioner. Specific reference was made to the 3rd Respondents' application to strike out the Petitioner's documents which was heard, while the Petitioner's application for summary judgment dated 7th December, 2017, was not heard. It bears stating that the reasons for not hearing the application at that point in the trial were given and are on record.

29. The Applicant also took issue with the decision of the Court dated 16th November, 2017 to have the application for scrutiny and recount await production of evidence**. Again t**he record of that ruling speaks for itself. It is worth noting that the Petitioner has not appealed against any of the decisions in this petition so far.

30. The applicant further accused the Court of giving open latitude to the Respondents in cross examination and restricting the Petitioner. Reference was made to the Court disallowing Counsel for the Petitioner from cross examining the 3rd Respondent on his academic qualifications.

31. The issue concerning the request for the production of the degree of the 3rd Respondent as proof of his academic qualifications was also addressed in the Ruling delivered by this Court on 16th November, 2017. From the pleadings the academic qualifications of the petitioner were never in issue. The third Respondent's qualifications on the other hand had been raised in the pleadings as one of the factors that the Court should consider in disqualifying him.

32. The Court made a finding in the Ruling of 16th November, 2017, that this was not an issue that arises for determination in this matter, as it had been heard and determined by a Court of competent and concurrent jurisdiction in Janet Ndago Ekumbo Mbete Vs Independent Electoral and Boundaries Commission & 2 others (2013) eKLR. There was therefore nothing to be gained from cross examining the 3rd Respondent on those academic qualifications in this Petition. This Court already being constrained for time by the Constitutional and statutory time limitations cannot afford to squander this limited resources in such a manner.

33. Ibrahim, SCJ, in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others [2013] eKLR, made reference to the American Case of Perry v. Schwarzenegger, 671 F. 3d 1052 (9thCirc. February 7, 2012) and stated as follows:

"The test for establishing a Judge's impartiality is the perception of a reasonable person, this being a "well-informed, thoughtful observer who understands all the facts", and who has "examined the record and the law"; and thus, "unsubstantiated suspicion of personal bias or prejudice" will not suffice."

34. In the case of Justry P. Lumumba v I.E.B.C & 2 others [2017] Eklr, Omondi J rendered herself thus:

"When the issue was raised – I expected a professional approach to it, certainly not some

fanciful techni-coloured sob stories based on guess work without an iota of specificity.

Certainly, the Constitution guarantees a litigant trial by an independent and impartial court – but there must be a substantive basis in making claims about likelihood of bias, not just blanket claims without a leg to stand on."

35. The 3rd and final question is who bears the burden of proof and has it been discharged? In the case of Kalpana H. Rawal v Judicial Service Commission & 2 Others (2016) eKLR it was held:

"it cannot be gainsaid that the applicant bears the duty of establishing 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."

36. The Application by the Petitioner appears to be a critique of the decisions of the Court which have gone against him and the proper forum for such contention would be the appellate arena. The decisions of the Court *per se* do not amount to evidence of bias on the part of the Court. The unsubstantiated suspicion of bias or prejudice by the Petitioner herein, does not suffice as reasonable grounds for recusal.

37. I must conclude by stating that Applications of this nature should be approached with caution as the relationship between the bar and the bench is one of mutual respect. I agree with the dictum of Mutuku J in Abdiwahab Abdullahi Ali v Governor, County Government of Garissa & 2 others [2013] eKLR where she stated:

"One last word of unsolicited advice to my brothers, legal counsels involved in this case; the same way this court and the judicial officer presiding over it holds the parties and counsels with respect and in high esteem, the same way the court and the presiding officer demands respect from the parties and counsels appearing before it. It is a mutual relationship. The parties and counsels practicing before this court must also be willing to be guided by the presiding officer. They must submit to the rule of law. Any party who is not satisfied with a ruling of this court is at liberty to file an appeal. That party would be acting within his rights and that is why our courts are hierarchical. I want to believe that we have moved away from the old era when it used to be a "jungle out there"

38. I am particularly reminded of the word of Mason J, sitting in the High Court of Australia, in the case of **Re: JRL, ex p CJL (1986) 161 CLR 342 at 352,** as referred to by Lakha J in **Kaplan & Stratton Vs L.Z. Engineering Construction and 2 Others (2000) eKLR as follows**:

"Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."

What is contained in the Petitioner's letter annexed to the Supporting Affidavit were as stated earlier his feelings and his views about this Court, to which he is entitled.

39. The Court must not be cowed into abdicating its duty of being an impartial arbiter in any given matter for fear of being accused of bias. In any case Mr. Aboubakar did reiterate in his submissions that his client is not questioning the Rulings the Judge has rendered in the Petition so far and therefore the question of appealing did not arise.

40. I have anxiously considered the grounds of the Application and the Affidavit upon which it is predicated. It is not lost on the Court that the contents of the letter referred to above were never reduced to averments in the affidavit. The entire affidavit itself upon which this application is premised does not

contain any averments as to bias.

41. I find therefore that the Petitioner has not proved that a **fair minded and informed observer, having considered the facts of this case, would conclude that there was a real possibility that this Court is biased.**

For the foregoing reasons the application dated 8th January, 2018, is found to lack merit and is accordingly dismissed.

Costs shall be in the cause.

DATED, SIGNED and DELIVERED at MOMBASA this 19th DAY OF JANUARY, 2018.

L. A. ACHODE

JUDGE

In the presence of No appearance for the Petitioners

In the presence of Mr. Mugambi for the 1st and 2nd Respondents

In the presence of Mr. Buti for the 3rd Respondent