



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 317 OF 2017

CHARLES NDUNGU MWANGI.....PETITIONER

VERSUS

I.E.B.C. CHAIRMAN- HON. WAFULA CHEBUKATI.....1ST RESPONDENT

EACC CHAIRMAN-HON. ELIUD WABUKALA.....2NDRESPONDENT

POLICE INSPECTOR GENERAL-

MR. JOSEPH BOINNET.....3RDRESPONDENT

ATTORNEY GENERAL-PROF. GITHU MUIGAI.....4THRESPONDENT

EDUCATION CABINET SECRETARY

- DR. FRED MATIANGI.....5THRESPONDENT

RULING

1. The Petitioner seeks that I disqualify myself from hearing this Petition. The crux of his application as I discern it from his application and his oral arguments is that he feels he will not get justice from this court because of what he describes as "the delay in his case."

2. The Petitioner has also made disparaging and contemptuous allegations which amount to an affront to the integrity, impartiality, diligence and competence of this court. In comparable circumstances, where a judicial officer was affronted by an application for recusal which, in his assessment, entailed an attack on his integrity, it was aptly said:-

"A judicial officer should not be unduly sensitive and ought not to regard an application for his recusal as a personal affront.[\[1\]](#) If he does, he is likely to get his judgment clouded; and, should he in a case like the present openly convey his resentment to the parties, the result will most likely be to fuel the fire of suspicion on the part of the applicant for recusal. After all, where a reasonable suspicion of bias is alleged, a Judge is primarily concerned with the perceptions of the applicant for his recusal for, as Trollip AJA said:-[\[2\]](#)

'(T)he Judge must ensure that 'justice is done'. It is equally important, I think, that he should also ensure that justice is seen to be done. After all, that is a fundamental principle of our law and public

policy. He should therefore so conduct the trial that his open-mindedness, his impartiality and his fairness are manifest to all those who are concerned in the trial and its outcome..."

A Judge whose recusal is sought should accordingly bear in mind that what is required, particularly in dealing with the application for recusal itself, is 'conspicuous impartiality.'

3. Although the right to a fair trial runs throughout out common law jurisprudence, it found majestic form and content in Article **50 (1)** of the Constitution of Kenya 2010. The Article provides for the right of everyone to have any dispute that can resolved by the application of law in a fair and public hearing before a court or if appropriate, another independent and impartial tribunal or body.
4. The conduct of judicial proceedings is now entrenched in the constitution. Article **159 (2) (a) & (b)** provides that in exercising judicial authority, the courts and tribunals shall be guided by the following principles— **(a)** justice shall be done to all, irrespective of status; **(b)** justice shall not be delayed.
5. Also relevant to this determination is Rule **6 (b)** of *The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* which requires parties to proceedings to comply with the directions of the court. Courts' directions serve a necessary purpose. Their primary aim is to ensure that the business of the court is run effectively and efficiently. Invariably this leads to the orderly management of courts' rolls, which in turn brings about the expeditious disposal of cases in the most cost-effective manner.
6. As pointed out below, I gave clear directions right from the *ex-parte* stage in conformity with the above Rule aimed at ensuring a speedy determination of this case. A brief examination of the history of this file is necessary to establish whether there is delay as alleged and if at all where blame (if any) lies.
7. This Petition was filed at the High Court of Kenya at Kiambu on 12th June 2017. On 13th June 2017, the Hon. Justice Ngugi ordered that the file be transferred to the Constitutional and Human Rights Division, Nairobi. The learned Judge also granted the Petitioner leave to amend his pleadings to conform with The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.
8. Upon transfer of the file as aforesaid, the Petitioner filed his petition, notice of motion and certificate of urgency on 28th June 2017. On 29th June 2017, the file was placed before me *ex-parte* and upon consideration of the matter and the reasons for the urgency, and guided by the law and authorities governing granting or refusing to grant *ex parte* orders, I was persuaded that the applicant/Petitioner had not satisfied the threshold for granting *ex parte* orders. Accordingly, I directed the Petitioner to serve the suit papers upon all the Respondents and fixed the matter for mention on 12th July 2017 for further directions.
9. I should also point out that the Petitioner had in his wisdom sued all the Respondents in their personal capacity. This necessitated personal service upon each of the Respondents' as the law demands.
10. On 12th July 2017, the Petitioner appeared in person but there was no appearance for any of the Respondents. There was no evidence of service filed in the court file as required. I directed the Petitioner to effect service upon all the Respondents. I fixed the matter for mention on 25th July 2017.
11. Again on the said date, there was no appearance for the Respondents. I pointed out to the Petitioner that since he had sued the Respondents in person, it would be prudent to effect personal service. I again directed him to serve all the Respondents and have a proper affidavit of service filed. I fixed the matter for mention on 24th October 2017. It should be recalled that it was the last week of the term and the High Court vacation was scheduled to commence on 1st August 2017, hence the date fixed was the earliest available as per the court diary.
12. The record shows that during the August 2017 vacation, the Petitioner filed a certificate of urgency

stating *inter alia* that "Article 159 (1) and (2) was violated by Hon. Justice J. M. Mativo who ignored the urgency for his petition which was aimed to stop Hon. Raila to be presidential candidate in August 8 2017..." On 18th August 2017, **Mwita J** who was the vacation judge upon consideration ruled that he did not see reason why the matter should be heard during the vacation and stated that no urgency had been demonstrated and directed the Petitioner to comply with the directions I had given and ruled that mention day date for 24th October 2017 as earlier fixed remains.

13. On 24th October 2017, there was a representative of the first Respondent but the other Respondents did not appear nor had they been served as directed. The Petitioner stated that he wished to apply for me to disqualify from hearing this matter. Counsel for the first Respondent requested he serves all the Respondents as earlier directed. I directed that the serves all the parties and I fixed the application for recusal for hearing on 6th February 2018.

14. On the said date all the parties were represented except the second Respondent. The application was argued. Counsel for the first Respondent was of the view that the application does not serve any purpose while counsel for the second Respondent left it to the court to determine the application.

15. From the history enumerated above, it is evident that the court gave clear directions for the Petitioner to serve the Respondents as the law demands. The matter could not proceed unless proper service had been effected, this being an elementary legal requirement. Hence, for the Petitioner to turn around and make such wild allegations while it is evidently clear that it is failure or refusal to effect proper service that led to the adjournments leaves a lot to be desired. Sincerely, he cannot be heard to pass the blame to the court nor can he expect the court to circumvent rules to allow his case to proceed without proper service.

16. From the above history, the allegation that this court delayed his matter is totally unfounded, made in bad faith, misguided, misleading and mischievous.

17. I am fully aware that impartiality, diligence and compliance with the law is a defining feature in a judicial officer's role in the administration of justice. The reason is clear; in a constitutional order grounded on the rule of law, it is imperative that judicial officers make decisions according to law, uphold the constitution, and ensure that their decisions are unclouded by personal bias or conflict of interests.

18. I am also aware that it is not enough that judicial officers be impartial and diligent. The public must perceive them to be so. But this perception can only be judged by the standard of a reasonable person properly exercising his mind to the circumstances of the case. Thus, unwarranted, unfounded, misleading or misguided accusations will not suffice.

19. Litigants have a duty to assist the court by complying with courts directions so as to move their cases forward. They also have a duty to be candid in their dealings with the court and in particular applications for recusal must as of necessity be grounded on justifiable reasons for the sole reason that the process of administration of justice must not be polluted by unwarranted attacks on judicial officers for ulterior motives. No one should be allowed to pollute the pure stream of justice by disobeying clear courts directions. For the case to be expedited, the parties must play their role and ensure that all the pre-trial steps are taken. It would be futile to confirm a case for hearing before pre-trial steps are fully complied with. The trial would be a futile exercise.

20. An application for recusal must be founded on genuine reasons which clearly demonstrate that a party will not get a fair trial or demonstrate clear evidence of unfairness or misconduct but not wild allegations.

21. The test applicable to determine whether a judicial officer is disqualified from hearing a case by reason of a reasonable apprehension of bias was enunciated in the case of *President of the Republic of South Africa and Others vs South African Rugby Football Union and Others*^[3]. At paragraph 48, the court said the following:-

“It follows from the foregoing that the correct approach to this application for the recusal of members of this court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case that is a mind open to persuasion by the evidence and submission of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.”

22. 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. **The Black’s Law Dictionary**^[4] defines the word bias as:-

“Inclination; prejudice,...judicial bias. A judge’s bias toward one or more of the parties to a case over which the Judge presides. Judicial bias is usually insufficient to justify disqualifying a Judge from presiding over a case. To justify disqualification or recusal, the Judge’s bias usually must be personal or based on some extra judicial reason.”

23. The test of reasonable apprehension was stated by Trevelyan J in the case of *John Brown Shilenje vs Republic*^[5] as:-

“Reasonable apprehension in the applicants or any right thinking person’s mind that a fair trial might not be heard before the magistrate. Mere allegations will not suffice. There must be reasonable grounds for the allegations”

24. 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.’^[6]

25. The Court of Appeal in the case of *Republic vs Mwalulu & Others*^[7] did set up principles on which a judge would disqualify himself from a matter and stated as follows:-

i. When the 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 specifically be alleged and established.

ii. In such cases the Court must carefully scrutinize the affidavits on either side, remembering that when some litigants lose their case they are unable or unwilling to see the correctness of the verdict and are apt to attribute that verdict to bias in the mind of the Judge, Magistrate or Tribunal.

iii. The court dealing with the issue of disqualification is not; indeed it cannot, go into the question of whether the officer is or will actually be biased. All the court can do is to carefully examine the facts which are alleged to show bias and from those facts draw an inference, as any reasonable and fair minded person would do, that the judge is biased or is likely to be biased.

iv. The single fact that a judge has sat on many cases involving one party cannot be sufficient reason for that judge to disqualify himself.

26. In *Kaplan & Stratton vs Z Engineering Construction Limited & 2 Others*^[8] **Lakha JA** had this to say:-

"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."

27. I have carefully considered the reasons advanced by the applicant, the leading authorities cited above and in my view, I find nothing to warrant recusal. As explained, the alleged delay, if any lies squarely at the door of the Petitioner who failed to effect proper service as clearly directed by the court.

28. In conclusion I find that the applicants' application for recusal has no merits. I hereby dismiss it with no orders as to costs.

Orders accordingly

Signed, Dated and Delivered at Nairobi this 21st day of February 2018

John M. Mativo

Judge

[1] *S vs Bam* 1972 (4) SA 41 (E) at 43G-44.

[2] In *S v Rall* 1982 (1) SA 828 (A) at 831 in fine - 832: See also *S v Malindi and Others* 1990 (1) SA 962 (A) at 969G-I and cf *Solomon and Another NNO v De Waal* 1972 (1) SA 575 (A) at 580H; *S v Meyer* 1972 (3) SA 480 (A) at 484C-F.

[3][1999] ZACC 9; 1999 (4) SA 147 (CC)

[4] 8th Edition at page 171

[5] Cr App No. 180 of 1980

[6] As was held in the American case of *Perry vs Schwarzenegger*, 671 F. 3d 1052 (9th Circ. Feb. 7th 2012

[7] {2005}1KLR

[8] {2002} KLR