REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION MILIMANI

ACEC CR. APPEAL NO. 9 OF 2018

(AS CONSOLIDATED WITH ACEC CR. APPEALS No. 10/2018, 11/2018 AND 12/2018)

JOHN GAKUO.....1ST APPLICANT

ALEXANDER MUSANGA MUSEE.....2ND APPLICANT

SAMMY KIPNGETICH KIRUI.....3RD APPLICANT

MARY NGECHI NGETHE.....4TH APPLICANT

VERSUS

REPUBLIC ..... RESPONDENT

RULING

1. The Appellants herein were jointly charged before Milimani Chief Magistrate's Court vide Anti-corruption case No. 20/2010 facing various charges relating to corruption to which they were convicted and sentenced on 15th May 2018. Subsequently, they moved to the High Court on appeal through their respective appeals No. 9/18, 10/18, 11/18 and 12/18 which were consolidated and proceeded under this file. Contemporaneously filed with the appeals were their applications for bail pending appeal. On 27th June 2018, the appeals were admitted confirming that the same were properly filed and ready for hearing.

2. Inspite of the prayer by the prosecution counsel to compromise the hearing of the applications for bail pending appeal in favour of the hearing of the substantive appeals, the Appellants' counsels were adamant thus insisting on hearing the said applications first. Consequently, the court granted their prayer and proceeded with the hearing of the applications on 4th July 2018 and a ruling thereof scheduled for 31st July 2018. Besides, the court went ahead and fixed the hearing of the main appeals on 23rd July 2018.

3. When the Court convened on 23rd July 2018 for hearing, both parties were ready to proceed by highlighting on their submissions and authorities already exchanged and filed. Unfortunately, the hearing could not take off because of the absence of the accused persons thus necessitating issuance of production orders for their attendance and hearing rescheduled to 31st July 2018.

4. On 31st July 2018, both parties expressed their readiness to argue the appeal. However, counsels insisted on delivery of the ruling first before proceeding with the substantive hearing. Immediately the court delivered the ruling denying the Appellants bail pending appeal on grounds that prima facie their appeals lacked merit, a dramatic turn of events ensued with the applicants' counsels urging the court to recuse itself from hearing the matter.

5. Key among the grounds cited by the Appellants' counsels for the court's recusal was the allegation that, the court's finding that the appeals had no overwhelming chances of success was a strong indicator that it had already formed an opinion to dismiss the appeals. Mr. Nyakundi and Mogikoyo Counsels for the 1st and 4th Appellants respectively urged the court to disqualify itself and forward the file to the Hon. the Chief Justice to appoint another judge to hear the appeals besides Hon. Justice Ongudi the only other Judge in the Anti-Corruption High Court Division whom they also claimed had handled a related matter.

6. Further, learned counsels contended that, it is not proper in law for a Judge who had dismissed an application for bail pending appeal to hear the main appeal. It was their submission that in all fairness and in order to preserve the integrity of the court, there was need for a different court to hear the main appeal for justice to be seen to be done. Associating themselves with the same sentiments, Mr.Kariba, Mr.Rugo and Nderitu appearing for the 2nd ,3rd and 4th Appellants respectively, vehemently supported the prayer for the court's disqualification.

7. In response to their submissions, M/s Aluda for the state opposed the application. Learned counsel wondered why the change of mind and tactic yet the Appellants were all along ready to proceed without raising any issue regarding the same court hearing both the application for bail pending appeal and the main appeal. M/s Aluda submitted that the Appellants were hell bent to forum shop a court of their choice hence delaying the hearing of the appeal. She opined that the court's finding that the application did not have overwhelming chances of success is a primafacie holding not comparable to proof of a case beyond reasonable which is the subject of the main appeal hence the difference in terms of threshold.

8. I have considered the application herein and objection thereof. The key issue for determination is whether a court which has heard and determined an application for bail pending appeal can hear the main appeal in respect to the same Applicant/Appellant. The application seeking this court's disqualification is hinged on the argument that, having dismissed the application for bail pending appeal, the Court is deemed to have made up its mind or likely to be influenced to dismiss the appeals. It should be borne in mind and actually in Mr. Mogikoyo's words, that none of the parties is alleging bias on the part of the court.

9. The test governing recusal of a Judge or a Judicial officer for that matter, has for a long time been a subject of judicial discourse and several pronouncements in which courts from various jurisdictions have ably dealt with the issue and the principles applicable settled. In the case of **Jasbir Singh Rai and 3 others vs Tarlochan Singh Rai (2013) eKLR,** the test for recusal of judges was rendered in the following words:

> **"....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. The object in view, in the recusal of a judicial officer, is that justice as between the parties be uncompromised; that the due process of law be realized, and be seen to have had its role: that the profile of the rule of law in the matter in question, be seen to have remained uncompromised".**

10. While expressing itself on the parameters for recusal in above case, the Supreme Court made reference with approval to the case of **South Africa Defence Force and others vs Monning and Others (1992) (3) SA 482 (A)** wherein the test for a party seeking recusal of a judicial officer was stated as follows:

> **"the test for establishing 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".**

11. As stated above, an application for recusal of a Judge must be based on real, actual or proven bias, influence or prejudice which when viewed from the lens of an ordinary person who is seized of the facts, having examined the facts and the law, will practically and realistically conclude or likely to conclude that an unfair trial for the litigant involved may result and the interest of justice would be compromised. Therefore, an application for recusal should not be made as a matter of course based on perception, hearsay, imagination, fear of the unknown, speculation or probabilities but rather on a serious interrogation on the reasons cited for recusal and its likely effect on substantive justice if proved or established.

12. In the recent case of **R vs Jane Muthoni Mucheru and Another (2017) e KLR Judge,** the court was faced with an application seeking its recusal on grounds that it had made a ruling in a related matter denying the Applicant bail hence likely to be influenced by the same finding to deny the instant Applicant bail. The presiding Judge dismissed that argument stating that, his impartiality and mind was open to determine the case based on the facts and the law at hand and not what happened in that other case.

13. In the case of **Galaxy Paints Company vs Falcon Guards Ltd(1999) eKLR Civil Appeal No.2019/1998 Nairobi**, the Court of Appeal faced with an application for two out of the three sitting Judges to disqualify themselves on the ground that they had in two previous occasions exercised discretion against the appellant, dismissed the application for their disqualification thus stating that;

> **"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…the two learned Judges of this bench have no good reasons for disqualifying themselves from hearing this appeal since the Appellant and Mrs. Dias have not advanced valid reasons for their disqualification''**

14. Further life was breath into the doctrine of recusal by Lord Denning who had this to say in the case of **Metropolitan Co. (GGC) Ltd vs Lannon and others (1968) 3 ER 304:**

> **"A man may be disqualified from sitting in a judicial capacity on one of these grounds. First, a direct pecuniary interest in the subject matter. Second, bias in favour of one side as against the other. .. In considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would or did in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people even if he was as impartial could possibly be, nevertheless, if right minded persons would think that, in the circumstances there was a real likelihood of bias on his part then he should not sit".**

15. In this case, the court has neither been accused of any bias nor does it have any pecuniary interest in the matter. My interpretation of the law at the interlocutory stage however bad it may have been cannot perse form a ground for my recusal. The best one would rationally do is to challenge the decision rather than cast an omnibus negative perception on the impartiality of the court.

16. What is the cause for alarm in the instant application? If there is no allegation of bias, what is troubling the applicants? There is no law

to my knowledge that prohibits or bars a Judge who having heard an application for bail pending appeal from hearing the main appeal in respect to the same party or litigant. If that were to be encouraged, what will happen in a station with one Judge who has to hear both the application for bail pending appeal and the appeal itself?

17. Assuming for a moment the theory advanced by the learned counsels that a court that dismisses an application for bail pending appeal has no legal or moral authority to entertain the appeal itself is correct which is not, why would they submit to the authority of the same court both in arguing the application, filing submissions for the main appeal and twice indicating their readiness to hear the appeal before the same court? Why did they change their mind midstream and immediately after delivery of the ruling yet they had indicated their preparedness to argue the appeal immediately preceding the delivery of the ruling?

18. From the counsels' arguments, it is apparent that they are not sincere to themselves or to their clients in the sense that they were all along aware that it was the same court that was seized of the matter both in the hearing of the application and the appeal itself. To manufacture an untenable general legal theory that a court that entertains an application for bail pending appeal cannot hear the appeal itself is not founded on any legal or factual position consistent with the properly laid out principles on recusal. I do agree with M/s Aluda that the application was not made in good faith.

19. To argue that a finding on lack of a primafacie case due to lack of overwhelming chances of success of the appeal is synonymous to a finding of proof beyond reasonable doubt which is the subject of the main appeal is to miss the point. A court can dismiss an application for bail pending appeal yet allow the appeal whose standard of proof is higher than that advanced on bail pending appeal. In the same vein, release on bail pending appeal does not automatically translate to success of the appeal itself.

20. I do not find any element of influence or prejudice to be suffered by the Applicants merely by making a finding that primafacie, their appeals have no overwhelming chances of success. It is common knowledge that time and again in the course of discharging judicial function, courts that hear applications for bail pending appeal do hear the appeals as well. An unfavourable finding by a court of law on a given subject can only attract an appeal and not recusal. Impartiality or bias is not borne out of an undesirable ruling or finding by a court.

21. I do not think a Judge who ascribes faithfully to the oath of office to administer justice without fear or favour would stoop too low to apply different principles in determining a matter such as this one where the principles for bail pending appeal are clearly distinct from those applicable in proving a case beyond reasonable doubt. My impartiality and appreciation of the law will be determined by the evidence or facts of the case and the law applicable. In the absence of bias or any interest in the matter, the grounds cited for recusal remains unproven and unsubstantiated hence the application is dismissed. The matter shall be fixed for hearing of the pending appeals on priority basis for expeditious delivery of justice.

Order accordingly

DATED, SIGNED AND DELIVERED IN COURT AT NAIROBI THIS 26th DAY OF SEPTEMBER, 2018.

J.N. ONYIEGO (JUDGE)