



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

PETITION NO.418 OF 2014

BETWEEN

THE SECRETARY ISIOLO COUNTY ASSEMBLY.....1ST PETITIONER

THE DEPUTY SPEAKER ISIOLO COUNTY ASSEMBLY.....2ND PETITIONER

THE CHIEF WHIP (MAJORITY)

ISIOLO COUNTY ASSEMBLY.....3RD PETITIONER

AND

THE SPEAKER (MOHAMMED TUBI)

ISIOLO COUNTY ASSEMBLY.....RESPONDENT

RULING

1. Before me is an Application seeking orders as follows;

i. That I should recuse myself from hearing and determining the Petition herein.

(ii) That upon recusal, if at all, the Petition to be transferred to any other Judge of this Division for hearing and determination.

2. The Grounds in support of the Application are as follows;

“(1) The Respondent/Applicant is apprehensive that he will not be accorded a fair trial if the same is to proceed before the learned Justice Lenaola.

“(2) The Respondent/Applicant’s apprehension is based on the conduct of the said Petition before the learned Judge. With particular regard to the Ruling delivered by the Judge on 30th September 2014 when the Judge made remarks that indicated that he has already taken a stand in the matter.

“(3) In particular, the learned Judge stated as follows in the said Ruling;

“I was initially tempted to conclude that the matters raised are serious

enough to warrant that the Respondent should be asked to leave office pending investigations by either the Court or the Ethics and Anti-corruption Commission but on reflection, such an order may not meet the expectations of justice.”

(4) Further, the Respondent/Applicant’s apprehension is made valid by the fact that the learned Judge hails from the Samburu Community which is largely represented in the County Government.

(5) It is public knowledge that there is continued conflict between the Samburu, Borana and Turkana Communities with the latest incident being that the Samburu Community has been accused of killing members of the Turkana Community, thus escalating tension between the said communities.

(6) The learned Judge and the Petitioners all hail from the Samburu Community with the exception of the 3rd Respondent who hails from the Turkana Community while the Respondent/Applicant hails from the Borana Community.

(7) It is common knowledge that the three Communities, that is, the Samburu, Turkana and Borana Communities have for a long time been in dispute.

(8) Based on the foregoing the Respondent/Applicant is apprehensive that he will not be accorded a fair hearing before the Court as currently constituted.

(9) In the circumstances, it is in the interests of justice that the Application be granted as prayed.”

3. The same Grounds were all repeated in different words by the Applicant, Mohamed Tubi, in his Affidavit in support but the gist of the Application is that the Applicant is apprehensive that he will not receive a fair hearing before this Court as presently constituted.
4. The Parties made no Submissions on the Application and it was agreed that the matter should be left to my decision based on the material on record. I have in that regard reflected on the grounds set out above and whether they can form the basis for any Judge to recuse himself from the hearing of any matter placed before him/her for determination.
5. In that regard, I have read the decision in **South African Commercial Catering and Allied Workers Union and Others vs Irvin & Johnson Limited Seafoods Division Fish Processing CCT 2/2000 (Constitutional Court of South Africa)**. In that decision, the learned Judges partly expressed themselves as follows;

“The Test for Recusal:

In Sarfu, this Court formulated the proper approach to recusal as follows; 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 an mind open to persuasion by the evidence and the submission of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the 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 a 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 the litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.”

6. The above test for recusal as set out in the Sarfu Case was then explained in the Allied Workers Union Case (supra) as follows;

“Some salient aspects of the judgment merit re-emphasis in the present context. In formulating the test in the terms quoted above, the Court observed that two considerations are built into the test itself. The first is that in considering the application for recusal, the court as a starting point presumes that judicial officers are impartial in adjudicating disputes. As later emerges from the Sarfu judgment, this in-built aspect entails two further consequences, on the one hand, it is the applicant for recusal who bears the onus of rebutting the presumption of judicial impartiality. On the other, the presumption is not easily dislodged. It requires cogent or convincing evidence to be rebutted.”

The Court went further and stated as follows;

“The second in-built aspect of the test is that absolute neutrality is something of a chimera in the juridical context. This is because judges are human. They are unavoidably the product of their own life experiences, and the perspective thus derived inevitably and distinctively informs each judge’s performance of his or her judicial duties. But colourless neutrality stands in contrast to judicial impartiality. A distinction the Sarfu decision itself vividly illustrates. Impartiality is that quality of open-minded readiness to persuasion without unfitting adherence to either party, or to the judges own predilections, preconceptions and personal views that is the keystone of a civilized system of adjudication. Impartiality requires in short, a mind open to persuasion by the evidence and the submissions of counsel and, in contrast to neutrality, this is an absolute requirement in every judicial proceeding. The reason is that;

“A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before courts and other tribunals...Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on dispute.”(per Sarfu)

7. The above holdings are very appropriate in the circumstances now obtaining before me and that is the test I shall apply in determining the Application under consideration. In the Application therefore and in that context, only two grounds of recusal have been advanced viz;
- i. That the Presiding Judge is of the ethnic Community known as the Samburu and since some of the Petitioners are of the same ethnic group, there is apprehension of bias in favour of the Petitioners. In addition, that since ethnic clashes have previously created divisions between certain ethnic Communities (including the Samburu) in Isiolo County, the Presiding Judge, as a Samburu, is most likely to favour the Petitioners as against the Applicant who is of the Borana ethnic group.
 - ii. That in a previous Ruling in the present Petition, the Presiding Judge expressed himself in a manner to suggest that he had already made up his mind that the Petition should be determined in favour of the Petitioners as against the Applicant.
8. In applying the test set out in both the Sarfu and Allied Union Cases , where is the evidence that the Judge’s ethnic background has any influence in how he determines this and other cases? None has been tabled whatsoever. Further, the Petitioners are the County Secretary, the Deputy Speaker of the County Assembly and the Chief Whip (Majority) of the Isiolo County Assembly, respectively. These are positions and titles that bear no ethnic imputations but even more

fundamentally, at the hearing of the Application, I asked each of the three Petitioners to identify their ethnic Communities and it turned out that they were Borana, Samburu and Turkana, the three Communities identified by the Applicant as having been engaged in ethnic clashes. Is it then reasonable to state on oath that while the Petitioners are one in filing the present Petition against him, the presence of a Judge of Samburu ethnicity will not favour him? The Petitioners are themselves members of the three allegedly warring Communities and if they made peace to file the Petition against the Applicant who is a Borana, what has their ethnic differences in Isiolo (and no evidence was placed before me in that regard) got to do with the sworn impartiality of this Judge? The submission made along those lines is unreasonable and the Applicant's apprehension for that reason is also unreasonable and I so find.

9. To my mind therefore and for the above reasons, the first ground raised is not only unreasonable but is also lacking in evidential specifics including whether this Judge has acted in any way throughout these proceedings in a manner to suggest bias in favour of any of the Petitioners for ethnic reasons.
10. Turning to the second ground, again the apprehension by the Applicant is misguided. The Ruling which he now cites as evidence of perceived bias was ultimately made in his favour.
11. The single line lifted from the entire Ruling to evidence bias does not in any way take into account all other findings made in that Ruling and was clearly cited to support an otherwise frivolous Application. In saying so, it is obvious to me that although initially all Parties were in agreement that the stalemate in the Isiolo County between the present Parties required urgent resolution by this Court, later the Applicant reneged on that clear agreement and is intent on stopping the determination of the present Petition at all costs. I say so with respect but based on my own assessment of the conduct of Parties and previous Rulings I have made in this matter. This statement is in no way an indictment of the Applicant nor of his case but an expression of what I have seen from where I sit.
12. Having so said, this Court is enjoined by the Judicial Oath to determine all matters placed before it without fear or favour. It will remain resolute in upholding that oath and fear and intimidation will not sway its mind to abdicate its solemn duty to do justice to all irrespective of their status including ethnic backgrounds. Similarly, it will never grant the favour of justice to anyone merely because of their ethnic extractions or affiliations. To do so would not only be a failure on its part but also a failure of the entire justice system. Justice and fairness must be protected at all costs and the Applicant's apprehensions are therefore misguided and ill-advised.
13. Lastly, the day a Kenyan Judge allows himself/herself, knowingly or unknowingly, to be bitten by the ethnic bug that plagues Kenya is the day that justice will cease to be our shield and defender. The day a Kenyan Judge gazes at litigants with the tainted lenses of ethnicity is the day that the Constitution will lose all meaning because an independent and impartial Judiciary is one cornerstone of the transformative **Constitution, 2010**. This Court refuses to be dragged down that thorny path and will undertake its duties with the sole intention of granting justice to all and sundry if they meet the tests set by the law itself.
14. In the end, the Application dated 18th December 2014 has no merit and is hereby dismissed. Let each Party bear its own costs as the Application was directed at the Court and not any Party.
15. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF JANUARY, 2015

ISAAC LENAOLA

JUDGE

In the presence of:

Kariuki – Court clerk

Mr. Ingutya for Petitioner

Mr. Kisaka for Respondent together with Mr. Faraj

Order

Ruling duly delivered.

ISAAC LENAOLA

JUDGE

Further Order

Parties to discuss settlement and direction on 22nd January, 2015.

ISAAC LENAOLA

JUDGE