REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

MISCELLANEOUS APPLICATION NO 18 OF 2015

VS

ISAYA OYOO, THE DCIO, NYERI POLICE STATION.
…….APPLICANT

VERSUS

JOSEPH WACHIRA GITAI…….....…….
……...RESPONDENT

RULING

The background to this miscellaneous application is that the Respondent herein sued the Applicant herein in the Chief Magistrates Court Civil Case number **232** of **2014**, Nyeri seeking *inter alia:-*

i. *An order directing the Defendants to release Motor Vehicle registration number KBJ 453 E as it was at the time it was impounded.*
ii. *General and Special damages for illegal and unlawful impounding of the said vehicle.*
iii. *Any other relief as the court my deem necessary and just to grant.*
iv. *Costs of the suit and interests.*

The Applicant herein tendered an appearance and a defence in the said suit vehemently denying each and every allegation in the plaint.

The applicants have annexed a copy of a ruling delivered in the said case dated 25.7.2014 which I believe was pursuant to an application filed by the Respondent herein seeking to have the above vehicle released. A copy of the said application, the replies filed in opposition to the same and the proceedings pertaining to the said application were not annexed so the only information availed to this court is the said ruling which as explained below contains some observations expressed by the trial magistrate which did not go well with the applicant hence the application before this court, the subject of this miscellaneous application. In my view it was necessary for the applicant to give this court a complete picture of all that transpired in the said case by exhibiting the application in question and the supporting affidavit, the Replying affidavit/grounds of objection filed in opposition to the said application (if any), the submissions by both counsels/proceedings and the the ruling in question. Nevertheless, this court will determine the application before it with the information availed by the applicant.

By a notice of motion dated 14th day of May 2015, expressed under the provisions of Section **18** of the Civil Procedure Act & Article **3, 10, 22, 23, 25 (c), 50 (1), 159 n(1), (2), (e)** of the Constitution of Kenya 2010, the Petitioners herein, the applicant moved to this court seeking orders:-

i. *Interim orders staying hearing of Civil Case No. 232 of 2014 pending the hearing and determination of this Miscellaneous Application or until further orders of this court.*
ii. *That this Honourable Court be pleased to withdraw, transfer and issue orders under Section **18** of the Civil Procedure Act directing the Nyeri cmcc No 232 of 2014 be heard and determined by magistrate other than the one who delivered the ruling dated 25.09.2014.*
iii. *Costs of the application be in the cause.*

The application is premised on the grounds on the face of the said motion and the annexed affidavit of the applicant herein **Isaya Oyoo** annexed thereto sworn on 15th May 2014.

Briefly, the applicants grounds are as follows:-

i. *Alleged threat and violation of the applicants' legal and constitutional rights to a fair administrative action and fair hearing in the said case.*

ii. *That the case was scheduled to be heard before the same magistrate, the subject of the complaints in this application.*

iii. *That the learned Magistrate made unfair and pre-judgement dispositions on 25.09.2014 against the applicant.*

iv. *That the Respondent will not be prejudiced by the orders sought.*

The applicants supporting affidavit adds the following grounds; that applicant is apprehensive about fairness in administration of substantive justice in the said case; and quoted verbatim the alleged offending words written by the learned magistrate in the ruling in question. The applicant avers that the magistrate made a conclusive finding of fact at the interlocutory stage hence makes him apprehensive that his rights as aforesaid will be violated if the matter is heard and determined by the same court.

In opposition to the applicants' application the Respondent filed a Replying affidavit sworn on 17th September 2015 advancing the following points:-

i. *That the application is mischievous, frivolous, vexatious and a waste of judicial time.*
ii. *A similar application was made on 10.11.14 at the lower court but was withdrawn, a fact that has been concealed to this court.*
iii. *Over five months lapsed after withdrawing the said application.*
iv. *No appeal or review was preferred against the ruling complained of.*
v. *A constitutional petition should be clear on the constitutional rights allegedly violated.*

At the hearing of the application, counsel for the applicant reiterated basically the details in the grounds cited above and the supporting affidavit. He specifically cited the adverse remarks attributed to the learned magistrate which appears at the ruling in question. To him, the said remarks impugn the credibility, and character of the applicant, and cited constitutional provisions guaranteeing fair and impartial hearing.

The application was vehemently opposed and counsel for the respond submitted that the applicant was shopping for favourable court, and stated that there was nothing wrong with the ruling in question, that the applicant never applied for a review or preferred an appeal against the ruling nor did he file a constitutional reference to seek a determination on whether his alleged constitutional rights had been threatened or violated as alleged. Counsel submitted that no application was made before the trial court seeking it to recuse itself and that an application for transfer should not be made just because one is unhappy with the court and urged the court to dismiss the application.

The ruling complained of is dated 25th July 2014 whereby the court ordered as follows:-

> *'A mandatory injunction do hereby issue in terms of prayer 3 and a prohibitory injunction also do issue in terms of prayer 5 of the notice of motion dated 4th July 2014. The parties should move with speed and list the suit for hearing within 60 days of to date. Costs in the cause"*

In the course of his ruling, the learned magistrate made some remarks/observations of and concerning the Applicant which seem not to have been received well by the Applicant. The words/observations complained appear at pages 17- 20 of the said ruling part of which reads:-

"…..At this point it is noteworthy that the conduct of the respondents has been incredible. They are so presumptuous as to be sure that the moment they raise the issue of a criminal inquiry, they need not go further and offer some evidence that indeed the tyres belong to a third party they claim is the complainant in the criminal inquiry. They are sure that the ownership of the tyres should be self-evident and obvious. They believe they are infallible and even had to be prodded by the court before they could file an affidavit to half-heartedly explain why they impounded the lorry. Naturally they feel they are not accountable to anyone and that was why they could impound the lorry with a load of murrum and direct it to the police station while all they were interested in were the tyres. The high handedness is numbing, considering that the applicant is not even an accused and the alleged offence is borderline (sic) with a civil dispute. The applicant had to move to court before he could know that the tyres fitted on his lorry had issues of ownership. Still, the 1st respondent could be said to have acted within the provisions of section 26 of the Criminal Procedure Code CAP 75 and Section 51 of the National Police Service Act, Cap 84 even if the way he went about it leaves a bad taste in the mouth…."

Although the right to a fair trial runs throughout our common law jurisprudence, it found majestic form and content in Article **50 (1)** of the Constitution of Kenya 2010. The said 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.

Impartiality has been 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, unclouded by personal bias or conflict of interests. It is not enough that judicial officers be impartial, the public must perceive them to be so. Under our constitution, litigants have a due process right to an impartial court.[1]

The applicant has applied for an order transferring CMCC No. 232 of 2014 from the Magistrate who made the above ruling to any other magistrate for final hearing and determination. The applicants main ground is that he is apprehensive that his rights to a fair trial have been threatened or he may not get a fair trial before the said magistrate the reason being he made the remarks complained off. The applicant asserts that the said comments are unfair and adverse to him and he refers to them as *pre-judgement dispositions*. My understanding of the term *'pre-judgement dispositions'* in the context of the applicants present application is that the applicant believes that the magistrate has already made up his mind against him or to put it bluntly, he is biased against him and as a consequence he does not expect a fair hearing at the final determination of the main suit.

It is instructive to note that the applicant has not complained about the final outcome of the said ruling, but the attack is directed against the perceived offensive words which the learned magistrate made in the course of his ruling. It's also important to mention that no appeal has been preferred against the said ruling or even a review. The implication is that the applicant has no issues with the final orders or final outcome of the said application, or has not said so, but complaints about the *"harsh"* language of the court. In any event, if the applicant was dissatisfied with the said ruling he would have appealed which he has not.

Also, it's important to point out that the applicant never formally applied to the magistrate to recuse himself from the case on account of the perceived bias. Instead he has moved to this court asking the court to invoke the provisions of Section **18** of the Civil Procedure Code[2] and transfer the said case to another Magistrate. My view is that it would have been prudent for the applicant to make such an application before the magistrate and if it is declined, then prefer an appeal against the ruling rather than invoke the provisions of Section 18 of the Civil Procedure Act.

The question that calls for determination is whether the applicant has demonstrated a good case to warrant this court to order that the said suit be transferred to another magistrate. Is there a reasonable basis for the applicant to believe that he would not get a fair hearing before the said magistrate? Are the observations complained of made in bad faith or was it an honest judicial opinion made by the magistrate in the course of analysing the facts and material presented to him in the application in question? Are judicial officers

restricted in making observations or conclusions on the character, truthfulness, credibility or reliability of the evidence tendered before them? If such limitations where to exist, what would be their implication in the administration of justice especially when a judicial officer is justifying why he found **A** credible and not **B** in a particular case? I will shortly address these questions.

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 v 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."*

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. Can the words complained of be construed to mean that the learned magistrate is biased and will not afford the applicant a fair trial? **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.''*

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''*

In the American case of **Perry vs Schwarzenegger**[6] it was held that 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.'*

The principles upon which transfer may be granted has been crystalized in several authorities one being **Shilenje vs The Republic**[7]cited above which lays down the law that for the High Court to order a transfer there must be reasonable apprehension in the applicant's or any right thinking person's mind that a fair and impartial trial might not be had before the magistrate whether one takes the incidences individually or collectively. Concomitantly there must be something before the court to make it appear that it is expedient for the ends of justice that an order for transfer ought to be made.

The principles which come out clearly are that the High Court will always require some strong grounds

for transferring a case from one judicial officer to another. The court has to consider whether there has been any real bias in the mind of the presiding judge and/or magistrate and also whether incidences have happened which might create in the mind of the parties a reasonable apprehension that he/she may not have a fair and impartial trial.

It is clear from the authorities that in an application to transfer a case from one magistrate to another or for recusal on account of bias, the applicant has to show he entertains an apprehension of bias on the part of the court, which apprehension must be reasonable.

In the **United States vs Grinnell Corp**[8]the Supreme Court of the United States of America opined that the alleged bias and prejudice to be disqualifying must stem from an extra judicial source, other than what the judge learned from his participation in the case. In the course of hearing the dispute and analysing the evidence, the judicial officer will inevitably find one party to be credible and believe his version and may find the other party to be incredible or untrustworthy. An observation in the decision explaining why a party was not believed is not an expression of bias nor can it be said to be pre-judging the losing party at the interlocutory stage. In the aforesaid cited case of the Supreme Court of the US, the court ruled that disqualification was unnecessary because '*any adverse attitudes towards the defendant that the judge referred to were based on his study of the depositions and briefs which the parties had requested him to make.*' In the present case it has not been shown that the alleged adverse comments were not based on the judicial officers' analysis of the material presented in the application before him.

A more candid and highly reasonable explanation of the so called *'extra judicial source'* enunciated by the US Supreme court in the above case has authoritatively been describe in a book entitled **"Judicial Disqualification: An Analysis of Federal Law''[9]** as *'a doctrine born from the common sense view that ordinarily the circumstances suggesting or creating the appearance of partiality cannot reasonably be derived from information revealed in the normal course of litigation because it is natural for judges to form attitudes about litigants and issues before the court as the facts unfold, and no reasonable person would question the impartiality of judges who do so"*

As the US Supreme Court explained in **Litekey vs United States**[10]:-

> *"The judge who presides at a trial may, upon completion of the evidence be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were probably and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task"*

However, in the above case the court was quick to point out that *the extra judicial* source is not the only basis for disqualification and referred to two different scenarios, namely; *when the remarks reveal an extrajudicial bias* and *when the remarks reveal an excessive bias arising from information acquired during judicial proceedings.* In the present case, no extra judicial bias has been alleged nor has it been shown that the words complained of do not emanate from observation from the information acquired during the proceedings and since the proceedings and the application that gave rise to the ruling in question was not annexed to the present application and only the ruling was attached, I am unable to make a firm conclusion as to whether or not the words complained of arose from the proceedings or documents tabled in court or whether they are extra judicial comments.

As the court explained in the *Litek* case cited above:-

> *"Judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They may do so if they reveal an opinion that derives from an extrajudicial source; and they will do so if they reveal such a high degree of favouritism or antagonism as to make fair judgement impossible.''*

The court took pains to emphasize that the latter form of bias-one that arises from what the judge learns in

the courtroom-must be truly excessive to warrant disqualification:-

> *"A favourable or unfavourable predisposition can also deserve to be characterized as 'bias' or 'prejudice' because, even though it springs from the facts adduced or the events occurring at the trial, it is so extreme as to display clear inability to render fair judgement."*

I am not persuaded that the words complained of are too extreme as to display a clear inability to render a fair judgement, nor has the applicant portrayed them as such in his application. In the South African case of **Moch v Nedtravel (Pty) Ltd t/a American Express Service[11]** the learned **Judge Hefer JA** said:-

> *"……it was for the petitioner to satisfy the Court that the grounds for her application were not frivolae causae (South African Motor Acceptance Corporation (Edms) Bpk v Oberhotzer[12]), ie that they were legally sufficient to justify the recusal of the presiding judge.……'*

Thus, were the words complained of in the present case legally sufficient to justify the transfer of the case in question to another magistrate? I do not think so. In Kenya the Court of Appeal in the case of **Republic vs Mwalulu & Others**[13]did set up principles on which a judge would disqualify himself from a matter (which I believe are applicable while considering transferring a case from one magistrate to another) 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.*

In **Kaplan & Stratton vs Z Engineering Construction Limited & 2 Others**[14] 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."*

I have carefully considered the reasons advanced by the applicant in this application, the submissions by both counsels, the words complained of, the leading authorities cited in this judgement and in my view, I find nothing to suggest that the words complained of were made in bad faith nor is there anything to show that there was any prejudice on the part of the judicial officer. In my view, the words in question are "*Judicial remarks made in the ruling in question arising from the magistrates assessment on the credibility or otherwise of the material presented before him including the conduct of the parties during and in the course of the hearing of the application and that there is nothing in the words complained of to support hostility to the applicant or to support bias or partiality. Further, there is absolutely nothing to reveal that the magistrates' opinion was derived from an extrajudicial source nor is there anything to reveal such a high degree of favouritism or antagonism such that it will be impossible for magistrate to*

make fair judgement if he tries the case.

In conclusion I find that the applicants' application has no merit and is hereby dismissed with costs to the Respondent.

Orders accordingly

Dated at Nyeri this **30th** day of **October** 2015

John M. Mativo

Judge

---

[1] See US Supreme Court Decision in Caperton vs A.T. Massey Coal Co129 S Ct 2252 (2009)

[2] Cap 221, Laws of Kenya

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

[4] 8th Edition at page 171

[5] Cr App No. 180 of 1980

[6] 671 F. 3d 1052 (9th Circ. Feb. 7th 2012

[7] {1980}KLR 132

[8] 384 U.S 563 {1966}

[9]Second Edition, Federal Judicial Centre 2010

[10] 510 U.S. 540, 550-551 {1994}

[11] [1996] ZASCA 2; 1996 (3) SA 1 (A), at 12F – 13A

[12] *1974(4) SA 808 (T) at 812C ad fin*

[13] {2005}1KLR

[14] {2002} KLR