



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL PETITION NO. 4 OF 2014

CIVICON LIMITED.....PETITIONER

-VERSUS-

THE KENYA REVENUE AUTHORITY

THE COMMISSIONER OF CUSTOMS.....1ST RESPONDENT

KIVUWATT LIMITED..... 2ND RESPONDENT

RULING

INTRODUCTION

1. The Application before court is the Notice of Motion dated 11th February 2014 (“the application”) in which the Petitioner seeks the following orders:
 - i. **THAT the Hon. Lady Justice Mary Kasango be pleased to recuse herself from hearing and determination of this Petition.**
 - ii. **THAT this Honourable Court be pleased to direct that the matter be placed before the Resident Judge of the High Court of Kenya sitting in Mombasa for directions in respect of its hearing.**
 - iii. **THAT the costs of this application be provided for.**
2. Briefly, the relevant history of this case is that the 2nd Respondent herein filed a case being, **Mombasa High Court Civil Case No. 117 of 2013: Kivuwatt Limited & Another v. The Commissioner, the Kenya Revenue Authority, Customs Services Department** (hereinafter **HCC No. 117 of 2013**) in which the 2nd Respondent sought mandatory injunction to compel the Kenya Revenue Authority (KRA) to release and ensure loading and guarantee exit from Kenyan boarders of equipment known as Seperator.
3. After HCC No. 117 of 2013 was filed, the parties thereto, vide a letter dated 18th November 2013 (“the consent”) requested the Deputy Registrar to record a consent under which the suit was to be marked as settled and the Seperator was to be released to the 2nd Respondent upon payment to the 1st Respondent of costs of Kshs. 200,000/-.
4. Before the consent could be adopted by the court, the Petitioner herein filed an application dated 15th November 2013 in HCC No. 117 of 2013 (“the application to be enjoined”) in which it

sought an order that it be enjoined in that suit as a second defendant. The application to be enjoined was heard by this court and a ruling delivered on 18th December 2013 (“the impugned ruling”) in which the same was dismissed.

5. Subsequently, the Petitioner moved to the High Court in Nairobi and filed, on 31st December 2013, Constitutional Petition No. 606 of 2013 in which the Petitioner sought, *inter alia*, a declaration that the consent letter dated 18.11.2013 and/or any other agreement entered into by KRA and the Commissioner for the release of the Separator to its owners without consent or involvement of Civicon (the Petitioner) is in breach of Civicon's constitutional rights and freedoms as guaranteed under Articles 10, 40, 47, 48, 50 and 73 of the Constitution of Kenya.
6. **Nairobi Constitutional Petition No. 606 of 2013** came up before Lenaola, J. on 28th January 2013 during which the learned judge directed that “since this matter has previously been heard in Mombasa, Application dated 7.1.2014 is to be heard before Kasango, J. on 5.2.2014.” The file was subsequently transferred from Nairobi to the High Court in Mombasa and was given a new serial number being, **Petition No. 4 of 2014**.
7. The Petitioner then filed the present application in which it is seeking my recusal from hearing and determining the Petition.

THE ARGUMENTS

The Petitioner's Case

8. The Petitioner's case is that I should disqualify myself from hearing the Petition because I have already rendered a decision in **HCC No. 117 of 2013** in which I denied the Petitioner audience and endorsed or approved the consent and in fact relied on it as a ground for dismissing the Petitioner's application to be enjoined in the matter. That I, having already made conclusive and final findings endorsing or approving the purported consent and having further relied on it to deny the Petitioner a chance to ventilate its claim against the 2nd Respondent, the Petitioner is reasonably apprehensive that I cannot impartially and independently render a fair and just decision on the instant application. That in the premises, the Petitioner has good reason to fear that the instant Petition will be in futility if allowed to proceed before a bench that has substantially made up its mind on the matter.
9. While arguing the application, Mr. Kashindi, learned counsel for the Petitioner, submitted that the Petitioner's discomfort emanates from paragraph 8 of the impugned Ruling in which the Petitioner claims that this Court approved the consent and relied on it to deny the Petitioner a chance to be enjoined in **HCC No. 117 of 2013**. Counsel submitted that the Petitioner's case in the instant Petition is that the decision by KRA and Customs to enter into a consent is unconstitutional. That hearing the Petition will make the court uncomfortable because the court will be invited to find the consent, which the court had approved, to be unconstitutional. That the natural inclination by the court would be to uphold its decision.
10. Mr. Kashindi further submitted that the court having made a determination on the consent, an impression is made of right thinking man that he may not get justice because the court will not depart from its earlier finding.
11. Another ground raised by the Petitioner is that the order made by Lenaola, J. that the matter be heard by me was erroneous because this Petition had not been heard by this Court. That this Court has never before dealt with this matter and therefore there is no basis upon which it can proceed with hearing of the matter.
12. According to the Petitioner, the proper division to deal with the Petition is the “Constitutional and Judicial Review Division” and not this court which is a “Civil, Commercial and Admiralty Court” since the issue in contention is the constitutional validity of the Respondents' action to enter into the consent

without taking into account constitutional rights of the Petitioner.

13. The Petitioner submitted that this Court having made a conclusive order endorsing the consent, the Petitioner was apprehensive that this Court cannot impartially and fairly render a decision because the Court has made up its mind. That even if the court was impartial, that impartiality may not be seen in the mind of a reasonable man. According to the Petitioner, there will be no loss of justice if another court was to hear the Petition.

14. Mr. Kashindi Advocate relied on the Supreme Court case of **Jasbir**

Singh Rai & 3 Others v. Tarlochan Singh Rai & 4 Others [2013] eKLR (Rai v Rai) to demonstrate that the power to recuse is so fundamental for justice to prevail even if such recusal is uncomfortable to the court.

15. The Petitioner also relied on the holding of Lord Denning in the case of **Metropolitan Properties Co. (F.G.C) Ltd v. Lannon & Others** (case supplied but with no proper citation) and argued that where the issue of bias is raised, it is not the court being safeguarded but the reasonable man. That justice is rooted in confidence; and the confidence is destroyed when right minded people go away thinking; “**The judge is biased.**”

The 1st Respondent's Case

16. The 1st Respondent did not object to the application but instead left it to court to make its decision.

The 2nd Respondent's Case

17. The 2nd Respondent opposed the application for recusal. Mr Ongoya, learned counsel for the 2nd Respondent submitted that this Court swore to impartiality and to do justice without fear as per the Oath of a Judge of the High Court contained in 3rd Schedule of the Constitution.

18. While relying on the Supreme Court case of **Rai v Rai**, Mr Ongoya Advocate submitted that the Petitioner has not given good grounds upon which this court ought to recuse itself. Counsel submitted that the grounds upon which a judge can recuse himself or herself are that the judge is a party to the case; is related to a party; is a material witness; has a financial interest in the outcome of the case; or had previously acted as counsel for a party.

19. Mr Ongoya Advocate relied on the decision of Ibrahim, JSC in the **Rai v Rai** case and submitted that the test to be applied is that of a reasonable man. That the question is whether a reasonable and fair-minded man sitting in court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible. Counsel submitted that based on that test, this court cannot be said to be biased since the impugned decision was arrived at after consideration of the evidentiary document before court, namely the consent letter which was exhibited and marked “KW1” in the Affidavit of Emmanuel Enani dated 4th December 2013 in HCC No. 117 of 2013 and on which the parties had the opportunity to submit on. That the court did not therefore consider extraneous matters before arriving at the impugned decision, only the evidence before it. That accordingly cannot amount to biasness on the part of the Court.

20. The 2nd Respondent's position is that by filing a petition in Nairobi, the Petitioner was asking the High Court in Nairobi to supervise the High Court in Mombasa by arresting proceedings of HCC No. 117 of 2013.

21. The 2nd Respondent countered the Petitioner's submission that the proper division to deal with this Petition is the “Constitutional and Judicial Review Division” and not this court which is a “Civil Commercial and Admiralty Court”. The 2nd Respondent, in that regard, relied on the case of **Peter Nganga Muiruri v Credit Bank Limited & 2 Others [2008] eKLR** to buttress its position that Article 165 of the Constitution gives every single judge of the High Court

jurisdiction and power to handle a constitutional question. That by filing the Petition, the Petitioner is seeking to subject this court to the supervision of another court.

22. While relying on the case of **Attorney General of Kenya v. Peter Anyang Nyong'o & Others, East African Court of Justice Application No. 5 of 2007 (Ref. No. 1 of 2006)** (hereinafter “the Anyang Nyong'o Case”), Mr. Ongoya Advocate submitted that it is common amongst unsuccessful litigants to suspect a judge is biased. That the court has to make a finding one way or the other and unless the Petitioner shows that there is a likelihood of bias, the court should not recuse itself merely because the Petitioner fears that the decision was likely to go against it.
23. In response to the Petitioner's submission that Lenaola, J. misdirected himself when he ordered that the matter be heard before me, the 2nd Respondent submitted that the Petitioner itself has admitted that this court had previously pronounced itself on the consent and that must have been what Lenaola, J. was referring to when he stated that this court has previously heard the matter.

ANALYSIS

Recusal of the Judge

24. The main ground relied upon by the Petitioner in support of its application for recusal is that this Court will not arrive at a fair and just determination of the Petition because it has already pronounced itself in a manner that is adverse to the Petitioner's interest in this Petition.
25. The test to be applied in determining whether a judicial officer should recuse/disqualify himself or herself over allegation of bias has been set by courts both within and beyond our jurisdiction.
26. In the **Anyang Nyong'o** Case (supra), the East African Court of Justice stated at paragraphs 34 and 35 as follows:

“There are two categories of scenarios. In the first, where it is established that the judge is a party to the cause or has relevant interest in its subject matter and outcome, the judge is automatically disqualified from hearing the cause...

In the second category, where the judge is not a party and does not have a relevant interest in the subject matter or outcome of the suit, a judge is only disqualified if there is likelihood or apprehension of bias arising from such circumstances or relationship with one party or preconceived views on the subject matter in dispute. The disqualification is not presumed like in the case of automatic disqualification. The applicant must establish that bias is not a mere figment of his imagination.”
(emphasis mine)

27. The Petitioner's problem is not that I am a party to the cause or that I have relevant interest in the subject matter and outcome of the case. Mr. Kashindi, learned counsel for the Petitioner, pointed out in his submissions that the Petitioner does not have a problem with the Court's integrity. He addressed the court as follows:

“We submit that the court may exercise a free mind. We have faith in the integrity of of this court...We suspect that you shall be as impartial as you can be.”

28. The Petitioner's only concern is that it is apprehensive that this court is likely to be biased because it has preconceived views on the subject matter. The Constitutional Court of South Africa in **The President of the Republic & 2 Others v. South African Rugby Football Union & 3 Others, (Case CCT 16/98)** (the S.A Rugby Football Union case) dealt with the test of bias in its judgment where the court stated as follows at paragraph 45:

“The test of bias established by the Supreme Court of Appeal is substantially the

same as the test adopted in Canada. For the past two decades that approach is the one contained in the dissenting judgment by de Grandpre J in *Committee for Justice and Liberty et al v National Energy Board*:

“...the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information... [The] test is 'what would an informed person, viewing the matter realistically and practically- and having thought the matter through- conclude.'”

...the test contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case...

An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for [a recusal] application.” (emphasis mine)

29. The question, therefore is, is the Petitioner's apprehension of bias in the circumstances of this case reasonable? In the impugned ruling, the Petitioner claims, this court endorsed and/or approved the consent which is the subject of this Petition and which the Petitioner claims to have been entered into in breach of its constitutional rights.

30. It is important to distinguish the subject matter of this Petition from the subject matter of the ruling delivered by this Court on 18th December 2013 in **HCC No. 117 of 2013**. The Petitioner has pointed out in no uncertain terms that the subject of this Petition is the consent entered into between the Respondents vide the letter dated 18.11.2013 and whether the said consent was entered into in breach of the Petitioner's constitutional rights. On the other hand, the subject of the impugned ruling was whether the Petitioner could be enjoined in **HCC No. 117 of 2013** as a second defendant. These are two distinct matters. The court did not address or render its views on the constitutionality or otherwise of the consent and whether the same was in breach of the Petitioner's rights. In my view, this court only made reference to the consent as support of a finding that the Separator was not in possession of the Petitioner, hence the Petitioner could not be enjoined in the suit. The consent was referred to by the court only to the extent of demonstrating that, in as much as the Petitioner was the one in physical custody of the Separator, it did not have legal possession of the same since it is only KRA who could authorise its release.

31. The court did not make any pronouncement on whether the consent was properly entered into by the Respondents, or not. The Petitioner's submission that this Court has a preconceived view of the propriety or otherwise of the consent is misconceived because this Court has never, either in the impugned Ruling or elsewhere, rendered its opinion on the propriety, legality, constitutionality or lack thereof of the consent.

32. The Court did not approve or endorse the consent as claimed by the Petitioner. All the court did was to rely on the evidence before it to arrive at its finding. The evidence before court at that time was the letter of consent, which had not been challenged at all. The court did not have any reason at all not to rely on the same, as no such reason was placed before court. The upshot of this is that, in my view, the Petitioner's apprehension of bias is unfounded and unreasonable and seems to me to be a mere figment of its imagination. The same cannot be a basis for the judge to disqualify herself (see the **Anyang Nyong'o** case, supra).

33. This court is called upon by the Constitution of Kenya to do justice to all irrespective of status (Article 159 of the Constitution). Every person has the right to have any dispute resolved in a fair and just hearing. Every judicial officer is called upon to observe and maintain high standards of conduct so that the integrity and independence of the judiciary is preserved. In the case of **RPM v**

PKM [2011] eKLR (RPM v PKM case), GBM Kariuki, J. pronounced himself as follows:

“It is not lost to me that an independent and honourable judiciary is indispensable to justice in our society and that every judicial officer is enjoined to observe and participate in maintaining and enforcing high standards of conduct so that integrity and independence of the judiciary is preserved.”

34. This court took the Oath contained in the Third Schedule of the Constitution. The Oath enjoins the court to decide cases in accordance with the Constitution. However, it should not be forgotten that in its endeavour to answer to the constitutional call, this court will not be without criticism. Criticism from litigants who have lost cases and who feel that the judge ought to have decided in their favour. G.B.M Kariuki, J. in the **RPM v PKM** case (supra) observed as follows:

“They [judicial officers] are required to act valiantly in preserving and using judicial power to do justice and to maintain truth. They must do that which good conscience dictates to be right upon application of the law regardless of criticisms. But they would be naïve not to expect criticisms. After all, there will always be winners and losers who will be disgruntled in litigation.”

35. Just like in any other contest, disputes in court in most cases result in either a winner or a loser, a party who is successful and another who is not. The natural tendency is that the party who is not successful will most likely be disgruntled and unhappy with the court's decision and will most likely condemn the court. In the **Anyang Nyong'o Case** (supra), the East African Court of Justice stated at paragraph 52 as follows:

“It is indisputable that different minds are capable of perceiving different images from the same set of facts. This results from diverse factors. A “suspicious mind” in the literal sense will suspect even where no cause of suspicion exists. Unfortunately this is common phenomenon among unsuccessful litigants.”

36. Success or failure of a litigant should not be a basis to attack or criticise a court. This was rightly held by the Constitutional Court of South Africa in the **S.A Rugby Football Union** case at paragraph 68 as follows:

“Success or failure of the government or any other litigant is neither grounds for praise nor for condemnation of a court. What is important is whether the decisions are good in law, and whether they are justifiable in relation to the reasons given for them. There is an unfortunate tendency for decisions of courts with which there is disagreement to be attacked by impugning the integrity of the judges, rather than by examining the reasons for the judgment... dissatisfaction with the outcome of a case is no justification for recklessly attacking the integrity of judicial officers.”

37. Although the Petitioner, as already pointed out, is not attacking my integrity, what I hear it to be saying is, “Because you made a previous decision against me, you are now likely to be biased against me.” A court cannot be disqualified merely on the basis of a previous decision which a party perceives to have been against it. In the **S.A Rugby Football Union** case the court stated at paragraph 104 as follows:

“While litigants have the right to apply for the recusal of judicial officers where there is a reasonable apprehension that they will not decide a case impartially, this does not give them the right to object to their cases being heard by particular judicial officers simply because they believe that such persons will be less likely to decide the case in their favour, than would other judicial officers drawn from a different segment of society. The nature of the judicial function involves the performance of difficult and at times unpleasant tasks. Judicial officers are

nonetheless required to administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law. To this end they must resist all manner of pressure, regardless of where it comes from. This is the constitutional duty common to all judicial officers. If they deviate, the independence of the judiciary would be undermined, and in turn, the Constitution itself.”

38. More at home, in the case of Galaxy Paints Company Limited v. Falcon Guards Limited [1999] eKLR, the Court of Appeal held as follows at page 6:

“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.”

39. A similar holding was made in Kaplan & Stratton v. L.Z. Engineering Construction Ltd & 2 Others [2001] eKLR, where the Court of Appeal stated as follows:

“Shah JA in Kenya Shell Limited v James G.K Njoroge (Civil Application No. Nai. 292 of 1998) (unreported) in which case there was an informal application for his disqualification referred to an English House of Lords decision in Locabail Ltd v Bayfield Properties Ltd [2000] 1 All. E.R. 65. At page 77 of that report their Lordships referred to a passage in the judgment of Callaway JA in the case of Clenae Pty v Australia & Newzeland Banking Group Limited (1999) VSCA 35, Vic SC wherein Callaway JA observed at para 89(e):

‘As a general rule, it is the duty of the judicial officer to hear and determine the case allocated to him or her by his or her head of jurisdiction. Subject to certain limited exceptions, a judge or magistrate should not accede to an unfounded disqualification application.’” (emphasis mine)

40. The Petitioner can only succeed in asking the court to recuse itself if it has reasonably demonstrated that the previous decision of this court was not good in law and was not justifiable in relation to the reasons given for it (see S.A Rugby Football Union case, aforequoted). In my opinion, the Petitioner has failed to do this. In fact, the Petitioner has not even alluded to the fact that it is aggrieved by the court's previous decision. The Petitioner has failed to demonstrate why it thinks the court's previous decision was not premised on sound legal reasoning as to justify the claim that this court will not apply its mind in a just and fair manner, as mandated by the Constitution and the law, in hearing and determining this Petition.

41. As already observed, there is always bound to be a winner and a loser in any dispute before court. If the judicial officers were to recuse themselves on the basis of previous decisions made against parties, nothing would move in our court system. There must be sufficient basis upon which a judicial officer must disqualify himself or herself from hearing a case. In RPM v PKM case (supra) the GBM Kariuki rightly held as follows:

“I am aware of the maxim that justice must not only be done, but that it must also be seen to be done. All judges, like Caesar's wife, should be above suspicion. But it would be chaotic if any allegation of bias, whether buttressed with sufficient grounds or whether baseless, were to be said to be sufficient to disqualify a judge from hearing a matter. If that were the case, all that a mischievous litigant would need to do to stall or stifle hearing of court proceedings would be to make allegations however flippant and without basis against a judicial officer presiding.” (emphasis mine)

42.I agree with the learned judge's holding above and add that if judicial officers were to disqualify themselves on the basis of allegations of biasness based on previous decisions against an applicant, our court system would be chaotic and amenable to forum shopping. Litigants would be free to decide which judicial officer they perceive fair to hear and determine their cases. A judicial system must be firm and predictable in order to be fair. It is not in the province of litigants to choose which judicial officer should hear their cases. The system of allocation of cases to judicial officers should remain certain and predictable to avoid manipulation at the behest and interest of litigants. Courts are bound to make decisions one way or the other and they should not be impugned on account of previous decisions if no basis is laid to justify the attack of such previous decisions. As was rightly held by the East African Court of Justice in the **Anyang Nyon'go Case** (supra) at paragraph 45;

“The court must guard against litigants who all too often blame their losses in court cases to bias on the part of the judge.”

43.The Petitioner did argue that the proper division to deal with this Petition is the Constitutional and Judicial Review Division of this Court. The different divisions of the High Court do not have their roots in the Constitution. It is therefore not correct to submit that because I sit in the Civil, Commercial and Admiralty Division of this Court I am not therefore suited to hear a Constitutional matter. I have after all at one time sat in the Constitutional and Judicial Review Division of this Court and I dispensed my duties in that Division in equal measure as I do in the Commercial Division. The different Divisions of the High Court were created for administrative purposes, orderliness and convenience and not for any other reason.

CONCLUSION

44.In the end it is my view that the Petitioner has not laid sufficient basis upon which this Court should recuse itself. The application dated 11th February 2014 is therefore dismissed with costs to the 2nd Respondents. The 1st Respondent did not oppose the same. Having however dismissed the application and having found that there was no sufficient basis laid before me for me to recuse myself I do however wish to have this case transferred and to be heard in its correct Division. As stated before the Divisions were created for convenience amongst other reasons. For that reason I order that this matter, in view of the urgency which all parties concede to, shall be mentioned before the Judge sitting in the Constitution and Judicial Review Division of this Court on 20th February 2014 for directions on further hearing.

Ruling by:

MARY KASANGO

JUDGE

DATED and DELIVERED at MOMBASA this 18TH day of FEBRUARY, 2014.

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JUDGE