



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 58 OF 2014

BETWEEN

OKIYA OMTATAH OKOITI.....1ST PETITIONER

NYAKINA WYCLIFF GISEBE.....2ND PETITIONER

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

KENYA RAILWAYS CORPORATION.....2ND RESPONDENT

PUBLIC PROCUREMENT OVERSIGHT AUTHORITY.....3RD RESPONDENT

CHINA ROAD AND BRIDGE CORPORATION (KENYA).....4TH RESPONDENT

RULING NO. 2

1. It is the right of every litigant to make an application for the judge to recuse himself or herself. The Court is obliged to consider it and the test for determining such an application now propounded by our courts in several cases including ***R v Jackson Mwalulu and Others CA Civil Appl. No. NAI 310 of 2004 (Unreported)*** is whether a reasonable person seized of the facts will conclude that the judge hearing the matter will be biased. In ***Republic v David Makali and Others, CA Criminal Application Nos NAI 4 and 5 of 1995 (Unreported)*** Tunoi JA stated that, ***“the test is objective and the facts constituting bias must be specifically alleged and established. It is my view that where such allegation is made, the court must carefully scrutinise the affidavit on either side.....”*** In both cases the court emphasised the need to disallow frivolous application which would tend to undermine the public confidence in the Judiciary.
2. The petitioners have moved the court by a Notice of Motion dated 8th April 2014 seeking my recusal on the following grounds;

c) *THAT on March 13, 2014, at the hearing of their application for the empanelment of a bench to hear the Application and the Petition herein, the learned judge refused to protect the Petitioners against the wild and unfounded accusations by the AG to the effect that the Petitioners were thieves. When the 1st Petitioner rose to protest the AG’s submissions, the*

learned judge simply brushed him aside. This bias disqualifies the learned judge from being a fair, impartial and honest broker in the matter herein.

d) THAT on 8th July 2013, the learned judge summarily dismissed Petition No. 354 of 2013, filed by the 1st Petitioner without considering its merits, and the Petitioners are therefore apprehensive that given that history, he is likely to be biased in favour of the Respondents given the strange and frivolous applications the Respondents have made for the summary dismissal of the matter herein without considering its merits.

e) THAT the Petitioners/Applicants herein will suffer irreparable detriment if the orders sought herein are not granted since their dispute will be irregularly determined by a partial court which does not meet the constitutional threshold of fair hearing enshrined in Article 50(1) of the Constitution.

3. The application is supported by the affidavit of Okiya Omtatah Okoiti sworn on 8th April 2004 in which he states at the material part as follows;

(6) THAT on 13th March 2014, during the hearing of the application for the empanelment of a bench, the learned judge ordered me to sit down when I stood up to protest the insults the AG was directing at the Petitioners. Such acts amount to being biased in favour of the AG, and if we cannot even ask for the protection of the court, we have no reason to feel safe in this court in the matter herein.

(7) THAT I aver that on 8th July 2013, and without reasonable cause, the learned judge spitefully dismissed my Constitutional Petition No. 354 of 2013. I was forced incur unnecessary costs seeking relief in the Court of Appeal vide Civil Application No. Nai 169 of 2013 (U8R 117/2013). Hence, I have a reasonable apprehension that the learned judge will be equally biased against me given the nature of applications made herein to scuttle Petition herein through summary dismissal.

(8) THAT at Paragraphs 5 and 6 of his ruling on 8th July 2013, in my Petition No. 354 of 2013, the learned judge quoted Article 22(2)(a) to the exclusion of Article 22(2) b & c and made comments on representation which in my estimation constitute an unconstitutional attempt to overthrow the very erudite/clear mandate of Article 22(2) b & c of the Constitution of Kenya 2010.

(9) THAT since the learned judge's unreasonable summary dismissal of my Petition No. 354 of 2013 at the ex-parte stage is still pending in the Court of Appeal, I am apprehensive of him presiding over pending applications to summarily dismiss the pleadings herein unheard.

(10) THAT I aver that natural justice requires that a judge shall disqualify himself/herself in any proceeding in which his/her impartiality might reasonably be questioned as it has been questioned herein.

4. Mr Omtatah who argued the application on the petitioners' behalf contended that the action of the judge on that date would lead to a likelihood of bias and that they would be unlikely to receive a fair hearing from the court.
5. The respondents oppose the application on several grounds. First, that the petitioners have in fact used intemperate and scandalous language in their depositions hence they cannot be heard to complain. Second, the application lacks factual and material basis for consideration. Third, the application is intended to delay the determination of the matter and is made in bad faith. They contend that on the whole the application does not meet the threshold for the test for disqualification.

6. I have considered the application and the arguments and I take the following view of the matter. First, it has never been the law of the land that where a judge strikes out a case against a party he or she is automatically biased. It is correct to state that I struck out **Petition No. 354 of 2013** on 8th July 2013 *suo moto* at an *ex-parte* stage. The 1st petitioner concedes that the matter is under appeal and I say no more on that save to add that the fact that I dismissed the petition was a fact well known to the petitioners when they appeared before me on several times for taking directions and indeed arguing an application. The 1st petitioner admits that this Court has heard several of his matters and that some have been allowed and others dismissed. This ground does not meet the test in **Jackson Mwalulu's case**.
7. The other ground is based on what allegedly transpired in Court on 13th March 2013. The Notice of Motion does not state what was allegedly said by the Counsel for the Attorney General to enable the Court consider whether a reasonable person with knowledge of the issues would come to the conclusion that the Judge would be biased in the circumstances. In any case the arguments on that day culminated in a ruling which has not been assailed.
8. I have read the documents that have been filed. The petitioners' side has levelled accusations and used strong adjectives to describe the office of the Attorney General and the respondents. On its side, the Attorney General has questioned the basis of the petitioner's information and how it was received by the petitioner. Nothing disclosed in the application and deposition points to the likelihood of bias in the circumstances.
9. It is the duty of the Court, and indeed the oath I have taken, to conduct the proceedings in fair manner by giving each party a reasonable opportunity to present its case.
10. In the circumstances, no case has been made out for recusal and consequently, the motion dated 8th April 2014 is dismissed.

DATED and DELIVERED at NAIROBI this 8th day of April 2014.

D.S. MAJANJA

JUDGE