



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CAUSE NO. 115 OF 2012

STEPHEN NJOROGE GICHUHAPLAINTIFF

VERSUS

FRED NYAGAKA ONGARORADEFENDANT

AND

FRED NYAGAKA ONGARORAPLAINTIFF

STEPHEN NJOROGE GICHUHA1ST DEFENDANT

CHARLES AYAKO NYACHAE.....2ND DEFENDANT

RULING

1. This Notice of Motion is brought under the provisions of Sections 1A, 1B and 3A and the inherent powers of the Court. The application seeks three orders as follows:

- (i) That for reasons to be recorded, this application is certified as urgent, service be dispensed with in the first instance and the matter be heard on a priority basis.
- (ii) That Hon. Waithaka J. does disqualify herself from hearing this matter and the entire matter be referred to the Environment and Land Court in Nairobi for hearing and determination.
- (iii) That all the proceedings and Judgment of Hon. Waithaka J. be set aside *ex debito justitiae*

2. The application is supported by grounds found on the face of the application and in the affidavit sworn by the applicant on 13th November, 2013. The application was urged before me on 24th January, 2014.

The Applicant's Case

3. The applicant's case is that I should disqualify myself from hearing this matter and set aside all the proceedings and my ruling delivered on 17th May, 2013 because Dr. Julius Ogeto who is listed in the defendant's list of witnesses is my husband and a brother in Law to the 2nd defendant in the counterclaim: That the existence of a filial relationship between myself, the 2nd defendant and one of the witnesses is a pointer to the possibility of real bias in the entire proceedings and there is apprehension on the applicant's part that I cannot impartially and independently render a fair and just decision on this matter.

4. While arguing the application, Mr. Githui learned counsel for the applicant, submitted that rule 5 of the Judicial service code of conduct was enough for the court to recuse itself as its impartiality is in question. The Rule provides;

"A judicial officer shall disqualify himself in proceedings where his impartiality might reasonably be questioned including but not limited to instances in which-

- a. **He has a personal bias or prejudice concerning a party or his lawyer or personal knowledge of facts in the proceedings before him;**
- b. **He has served as a lawyer in the matter in controversy;**
- c. **He or his family or a close relation has a financial or any other interest that could substantially affect the outcome of the proceedings: or**
- d. **He, or his spouse, or a person related to either of them or the spouse of such person or a friend is a party to the proceedings."**

5. He relied on the following authorities in support of his application which I have read and considered.

- a. **Trust Bank Ltd Vs Midco International (K) Ltd & 4 Others (2004) eKLR.**
- b. **The Weekly Law Report (1999) Regina Vs Bow Street Metropolitan Stipendiary Magistrate & others, Ex parte Pinochet Ugarte**
- c. **Locabail (UK) Ltd V Bayfield Properties Ltd & Another.(2001) 1ALL ER**
- d. **Metropolitan Properties Co (F.G.C) Ltd Vs Lannon A.& Others (1968) 3ALL E.R**
- e. **Gitobu Imanyara & 3 others Vs Attorney General (2012) eKLR- NBI HC Petition No.78,79,80 & 81 of 2010**
- f. **Ajay Shah Vs Attorney General & 3 others (2013)eKLR-Nbi.HCCC No. 1243 of 2001**

The Respondent's Case

6. The application is opposed. Mr Konosi, learned counsel for the Respondent submitted that there was no relationship between the court and the subject matter of the suit; That Dr Ogeto had not sworn a witness statement and although listed as a witness will not be testifying during trial : that even if he was testifying, this would not be sufficient reason for this Court to disqualify itself. He urged the court to consider the inconvenience to the respondents if this matter is transferred to Nairobi. Finally he made reference to the letter by the applicant's Counsel written to the Deputy Registrar dated 22nd October, 2012 clearly showing that the applicant was dissatisfied with the ruling delivered by this court on 17th May, 2013 and the current application was an "Appeal" against the ruling.

ANALYSIS

Recusal of the Judge

7. The main ground relied upon by the Applicant in support of his application for recusal is that this Court will not arrive at a fair and just determination of the matter because of its relationship with a person mentioned in the suit who played a role in bringing the parties in this suit together.

8. The issue of the circumstances under which a judge may be required to recuse him/herself has been explained by the elaborate decisions of the courts made over the years both within and beyond our jurisdiction.

9. In the case of **Dimes vs Proprietors of Grand Junction Canal**, the House of Lords set aside Lord Chancellor Cottenham's decision in the case on the ground that he had a pecuniary interest in the matter

by virtue of the fact that he had a substantial shareholding in Grand Junction Canal.

10. This is supported by the commonly cited holding of Lord Hewart CJ in **R vs Sussex, ex parte McCarthy** that **“it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”**

11. In **R vs Bow Street Metropolitan Stipendiary Magistrate & Others Ex parte Pinochet Ugarte (supra)** the House of Lords in explaining the circumstances under which the Court applies the above principle, observed that where a judge does not have a direct pecuniary or proprietary interest in the outcome of the matter but in some other way his conduct may give rise to a suspicion that he is not impartial the principle applies.

12. These precedents clearly indicate the weight with which the principle has been held by the Courts and the extent to which the Courts will jealously guard it. Even if it results in some inconvenience on the part of the Court it would be gladly borne for justice to prevail.

13. In **R vs Gough**[1993] 2 All E. R 724, [1993] AC 646 Lord Goff of Chieveley observed that:

“The nature of the interest is such that public confidence in the administration of justice requires that the judge must withdraw from the case or, if he fails to disclose his interest and sits in judgment upon it, the decision cannot stand. It is no answer for the judge to say that he is in fact impartial and that he will abide by his judicial oath. The purpose of the disqualification is to preserve the administration of justice from any suspicion of the impartiality.”

The Court must therefore, take into consideration the impact that the failure of the judge to disqualify him/her self will have on the public concerning their perception of the process of administration of justice.

14. More at home, in 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)**, the East Africa 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.”

14. The applicant'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. Githui learned counsel for the applicant, pointed out in his oral submissions and letter dated 22nd October, 2013 that the applicant does not have a problem with the Court's integrity. In the said letter he states as follows:

“We however wish to put it very clearly that the integrity of the Honorable Judge cannot be put to question. We hold her person and her office in very high regard.....”

15. The applicant's only concern is that there is apprehension that if this court continues to hear the matter there is a real likelihood of the appearance of bias by a reasonable person.

16. 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.”

17. A reasonable litigant should take these considerations into account when making an application for a disqualification of a judicial officer in a matter. The presumption in favour of a judges’ impartiality must therefore be taken into account whether such a reasonable litigant would have a reasonable apprehension that the judicial officer was or might be biased. This is simply because absolute neutrality on the part of a judge can hardly if ever be achieved. In the words of **Benjamin N. Cardozo in The Nature of the Judicial Process (1921) at 12 to 13;**

" There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognise and cannot name, have been tugging at them – inherent instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social need In this mental background every problem finds its setting. We may try to see things objectively as we please. Note the less, we can never see them with any eyes except our own. ... deep below consciousness are other forces, the likes and dislikes, the predilections and the prejudices, the complex of instincts and emotions and habit and convictions, which make the person, whether she or he be the litigant or judge."

Conclusion

18. 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.”

19. Having arrived at the above conclusion, I disqualify myself from handling this matter going forward. I have really agonized as to whether I should go ahead and determine the rest of the prayers. In my view the interests of Justice will better be served if the rest of the prayers in the application are handled by a different court. Consequently I direct the applicant to set the matter for mention before a different court

for further directions and/ or orders

Dated and Signed at Nakuru this 4th day of April 2014.

L N WAITHAKA

JUDGE