REPUBLIC OF KENYA

High Court at Bungoma

Petition 3 of 2012

MUMIAS SUGAR CO. LTD……....……..PETITIONER

versus

1. DIRECTOR OF PUBLIC PROSECUTIONS

2. COMMISSIONER OF POLICE

3. ETHICS AND ANTI-CORRUPTION COMMISSION……RESPONDENTS

RULING

INTRODUCTION

Judge was an employee of Ethics and Anti-corruption Commission (EACC)

[1] May it be known to all that, before I was appointed a Judge of the High Court of Kenya, I was an employee of the Ethics & Anti-corruption Commission as the *Principal Attorney, Civil Litigation and Asset Recovery*. That fact is not in dispute although it is the basis for the present application.

ISSUE

[2] I have been called upon to disqualify myself from hearing this matter for the reasons that;

a) Prior to my appointment as a judge, I was an employee of EACC;

b) EACC is a party in these proceedings; and

c) The subject matter of the suit began while I was still an employee of EACC.

[4] I am glad that neither my competence as a judge has been question, nor is it being claimed that I have any interest, personal, pecuniary or otherwise, in this matter.

The Application

[5] Mr. Omwebu for Prof. Tom Ojienda for the Petitioner on 29th November, 2012, made an oral application calling for my recusal from hearing this Petition and another related Petition **BGM HC PETITION NO 1 OF 2012**. According to him, it is prudent if this matter was transferred to another judge for hearing and disposal for two reasons.

One, the case involves EACC where I was working as principal attorney.

And the other, that the case was instituted while I was still serving as an employee of EACC.

[6] For those reasons, the Petitioner feels the cases should be transferred to another judge for hearing *so that justice will not only be done but also be seen to be done*. Counsel however made it clear that the Petitioner is not questioning the competence of the judge.

Counsel argued that it is not in dispute that the judge was working for EACC and the application is made in good faith. He further argued that it is the right of the Petitioner to raise issues that they think will have a bearing on their rights.

The application, he argued, is not a mere technicality envisaged under article 159(2) (d) of the Constitution. It raises a constitutional issue on which judicial authorities are legion.

[7] The Petitioner reinforced the oral application made on 29th November, 2012 by written submissions dated 4th December, 2012 and the judicial authorities that accompanied those submissions.

The thrust of those submissions is that:-

a) ***The application for disqualification was aimed at preventing the judge from being embroiled in a conflict of interest in the matter, and safeguard the constitutional rights of the Petitioner;***

b) ***The right of any litigant to apply for recusal of a judge is derived from the right to fair hearing before an independent, impartial and unbiased tribunal under Article 50 of the Constitution which is buttressed by Article 159(2) (a) that courts should be guided by the principle that justice shall be done to all, irrespective of status and Article 160(1) on independence of the judiciary***

c) ***That at common law, the rule against bias, the nemo judex underpins the fair process and public confidence in the administration of justice***

d) ***That impartiality is the cornerstone in decision making by judicial officers; based on the law and free from personal bias or conflict of interest***

e) ***That the relationship the judge had with EACC makes the judge to be a judge in his own cause***

[8] The Petitioner relies on the following judicial decisions:-

1. KAPLAN & STRATTON v L.Z. ENGINEERING CONSTRUCTION LIMITED & 2 OTHERS [2000] KLR 364

2. REX V SUSSEX JUSTICES [1924] 1 K.B 256

3. METROPOLITAN PROPERTIES CO. (F.G.C.) LTD V LANNON & OTHERS [1968] 3 All ER 304

4. JACINTA WANGARI MACHARIA V ATTORNEY GENERAL & 2 OTHERS [2009] e KLR

5. RPM v PKM [2011 e KLR

Respondents opposed the application

[9] The first to attack the application by the Petitioner was Mr. Ogoti for the 1st Respondent. He submitted that the application is not made in good faith. The Petitioner is merely ‘acting smart’ and is fishing wide for any flimsy ground to prolong the case.

[10] Mr. Ogoti urged that, for such application to succeed, the applicant must demonstrate bias or prejudice on the mind of the court or the judge. He said that he is aware that the judge was working with EACC as the Principal Attorney in one of the departments But, it has not been demonstrated that the department in which the judge served, dealt with criminal matters such as this. Counsel said that he is aware that there are various departments in EACC and the judge headed the civil litigation department. It has not been shown that this matter came before the judge when he was at EACC and dealt with it in a manner that will make the judge biased. Nothing has been shown that what the judge did would raise an impression of bias or prejudice.

[11] Counsel posits therefore that, this being a constitutional matter, it does not make sense that the Petitioner has applied for disqualification of the judge particularly given that the judge is competent and no bias that has been shown. To him, the application is *mala fides*.

[12] Mr. Makali for Kanjama for the interested party also opposed the application for disqualification. He termed the application as a gimmick to stifle the hearing of this matter. First, he pointed out that there is no formal application that has been made in order to bring out the facts which will pull a reasonable mind to conclude there will be bias, conflict of interest or prejudice on the part of the judge. The Petitioner is simply raising issues from the bar.

[13] Last time when the matter came up before the judge, no complaint was lodged. Therefore, he finds the request for the judge to disqualify himself from hearing the case a gimmick. He expected a serious matter as this not to have been introduced in such a casual manner. If this kind of approach is to be allowed, litigants will be at liberty to choose which judge will hear their cases, and that will be the saddest day in administration of justice.

[15] As pointed out by Mr. Ogoti, Mr. Makali reiterated that this case relates to criminal investigation which the Petitioner wants to prohibit. Nothing on record that shows the judge ever handled any of the issues that are subject of these proceedings. It is thus wrong to say that the mere fact that the judge worked for EACC, which is a constitutional body, should be a basis for disqualification. Mr. Makali fully adopted the submissions by Mr. Ogoti.

[16] He further told the court that this case has been pending for a long time and indeed the interested party Mr. Omutata and Mr. Kanjama had been physically attacked over these matters. This being a case for enforcement of rights, it is in the interest of all parties that the case should be heard and concluded expeditiously.

[17] The application for disqualification is just a way of delaying the case and that attempt should be resisted by dismissing the application. That way, the court will be able to try the case on merits. Mr. Makali reminded that it was agreed by consent that the matter proceeds before the judge, and that order has not been vacated. He prayed that the application be dismissed.

[18] Mr. Makali filed the following list of judicial authorities:-

1. OKIYA OMTATAH OKOIT v ATTORNEY GENERAL; PETITION NO. 451 OF 2012.

2. SALIM & 4 OTHERS v OMAR & 8 OTHERS (1994) KLR 654.

3. REPUBLIC v MWALULU & 8 OTHERS (2005) 1 KLR 1.

4. OLE KEIWUA v CHIEF JUSTICE & 6 OTHERS (2006) 1 KLR 161.

COURT RENDERS ITSELF THUS:-

The first time matter came before the judge

[19] This case and another related case namely **BGM HC PETITION NO 1 OF 2012** first came before

me on 22nd November, 2012, when it was agreed among the parties that the cases should proceed for hearing before me on 29th November, 2012. No application for disqualification that was made at that time. But that is beside the point. The question is; whether the issues raised can legally be a basis for disqualification of the judge from hearing the case.

The framework for determining the application

[20] The application herein is one for the judge's recusal, on a constitutional front, from hearing this case and **BGM HC PETITION NO 1 OF 2012**. I reckon that an application such as this should be determined within the constitutional structure of the nation, which has placed the right to a fair hearing upon a high pedestal as inviolable and fully armoured that it cannot be limited under Article 24 of the Constitution of Kenya, 2010. Invariably, that right integrally encompasses the right to access to justice and to be heard by an impartial and independent court of law or tribunal. It is within that constitutional framework that I will determine the issues before me. This is an approach that has been employed, and rightly so, in other cases, but I will specifically refer to **NBI HC PETITION NO 451 OF 2012 BETWEEN OKIYA OMTATAH OKOIT V THE AG** when *Majanja J* was confronted with a similar application for disqualification.

I therefore entirely agree with Prof. Tom Ojienda's submissions in that respect

[21] I will also be guided by Case Law which is an indispensable tool that assists the court in giving practical grip to the constitutional provisions on administration of justice. The appropriate test to be applied in determining an application for disqualification was laid by the Court of Appeal in **R v DAVID MAKALI AND OTHERS C.A CRIMINAL APPLICATION NO NAI 4 AND 5 OF 1995 (UNREPORTED),** andreinforced in subsequent cases. See **R v JACKSON MWALULU & OTHERS C.A. CIVIL APPLICATION NO NAI 310 OF 2004 (Unreported)** wherethe Court of Appeal stated that:-

When 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 be specifically alleged and established.

[22] That position of the law in Kenya was accordingly guided by the principle set out in **METROPOLITAN PROPERTIES CO., LTD v LANNON (1969) 1 QB 577, [1968] 3 All ER 304, [1968] 3 WLR 694** that:-

Also in a case where the bias is being alleged against a court or judge it is not the likelihood that the court or judge could or did favour one side at the expense of the other that is important, it is that any person looking at what the court or judge has done, will have the impression in the circumstances of the case, that there was real likelihood of bias.

[23] The law on this subject is so well settled that it cannot be called upon to justify itself, and the judicial authorities on the subject are legion. The copious judicial authorities provided by the parties to the court are all relevant on this subject but I do not wish to multiply them. I should only apply the above test to the circumstances of this case.

<u>THE TEST: IS THERE REAL LIKELIHOOD OF BIAS?</u>

What does bias entail?

[24] According to the *Black's Law Dictionary*, 7th Edition bias entails:-

Inclination, prejudice; Judge's bias usually must be personal or based on some extrajudicial reasons.

Prejudice entails:-

A preconceived judgment formed without a factual basis, a strong bias.

[25] I take the view that the Petitioner should establish such material facts that attend personal inclination or prejudice on the part of the judge towards a party on some extrajudicial reasons. Real likelihood of bias would therefore occur when the matters complained of create *a reasonable doubt* in the minds of the public about the fairness in the administration of justice in the particular case in question. The operating phraseology is *a reasonable doubt*-an elusive expression-but ordinarily refers to an impression of doubt that goes beyond mere apprehension or belief of the parties to a more concrete and cogent grounds based on the judge's personal interest, pecuniary or otherwise in the case. The applicant must therefore specifically set out the facts constituting bias and prove them as such in order to establish real likelihood of bias for purposes of disqualification of a judge. Although nothing precludes the court from hearing an oral application for recusal, it is absolutely necessary that the party applying should lay all relevant material before court. The best way of delivering on that requirement is by adopting a method that inherently enable for some formal deposition of facts and production of evidence. On that basis, I do understand the argument by Mr. Makali that a formal application should have been made supported by an affidavit in order to bring out, under oath, all material facts.

This stringent test

[26] It bears restating that the stringent test is more in accord with the constitutional desire to attain the independence of the judiciary as an indispensable facet of the right to fair hearing and access to justice. As parties submit themselves to the court, they do so to an independent, thoroughly fearless and impartial judicial officers. What must be avoided therefore is a practice that may encourage parties to 'shop' for the judges who will hear their cases in the belief that those judges will be favourable to their causes. If 'shopping' for judges was to be allowed, I agree with Mr. Makali such will be the darkest day in the administration of justice. The values, objects and purposes of the Constitution and specifically as enshrined in Articles 10, 50, 159(2) (a), 160 and 259 of the Constitution of Kenya, 2010 will be lost, and that shall surely be the death knell of the entire justice system in any civilized society.

Has the Petitioner specifically established bias?

[27] It is expected that any party who wishes to apply for a judge to disqualify himself or herself from a case should make a conscientious decision based on real facts which impinge on the ability of the judge to make an impartial decision in the matter. As I have already pointed out, the bias must be of a nature that attends personal inclination or prejudice towards a party on some extrajudicial reasons in order for an inference for real likelihood of bias to be made. See **REPUBLIC v MWALULU & 8 OTHERS** onthis issue. The onus of establishing facts that constitute bias lies on the applicant which he must discharge to the appropriate standard. Are the allegations herein capable of creating such reasonable doubt that the judge is incapable of administering justice herein without bias?

[28] I am able to discern from the submissions by the Petitioner that the major reason for asking for my recusal from hearing this matter is:-

That by virtue of your Lordship's former relationship with the 3rd Respondent and the position you held makes Your Lordship otherwise so closely connected with the 3rd Respondent and the matter herein that you might be said to be a judge in your own cause.

[29] On the reason given, I find myself associating with the finding of the court in **KAPLAN & STRATTON v L.Z. ENGINEERING CONSTRUCTION LIMITED & 2 OTHERS [2000] KLR 364** that it would be dangerous proposition to lay down as law that, irrespective of the nature of the claims of bias against a judge on account of previous employ as a partner in a law firm, should not sit on any case where his previous firm is involved. Such a proposition would negate the ideal that judges are men and women of integrity capable of disabusing themselves from any predispositions, and deciding cases fearlessly and impartially free of extraneous factors.

[30] The Petitioner just broadly stated that the judge's employment by and the position he held at EACC makes the judge ***so closely connected with the 3rd Respondent and the matter herein that I might be said to be a judge in your own cause.*** It is not in doubt the judge was employed by EACC as the *Principal Attorney,* in charge of the department of *Civil Litigation and Asset Recovery.* What is incumbent upon the Petitioner to prove, is that the *alleged closeness* with the subject matter of this case was such that ***any person looking at what the court or judge has done, will have the impression in the circumstances of the case, that there was real likelihood of bias.***

Operational structure of EACC

[31] From the arguments of the Petitioner and the other parties (especially Mr. Ogoti) herein on EACC as a state organ, it is profitable to understand the operational structure of EACC at the material time. Mr. Ogoti and Mr. Makali specifically submitted that EACC is made up of various departments and that I headed the litigation department. They also submitted that I did not handle criminal investigations including the one subject of the petitions herein. This leaves the matter of operational arrangement of EACC for the court to decide and is extremely useful in unravelling the allegations by the Petitioner of *the closeness* of the judge with the subject matter.. I am guided by the case of **HERMAN P. STEYN CHARLES THYS CIVIL APPEAL NO 86 OF 1996,** where the Court of Appeal quoted with approval a statement in the case of **ODD JOBS v MUBIA [1979] E.A 476**that:-

A court may base its decision on an unpleaded issue if it appears from the course followed at the trial the issue has been left to the court for decision.

On the facts the issue had been left for decision by the court as the advocate for the appellant led evidence and addressed the court on it.

[32] The operational structure of EACC at the time consisted in four Directorates namely:-

1. Investigations and Asset Tracing (IAT);
2. Preventive Services;
3. Legal Services; and
4. Finance and Administration.

[33] Each Directorate had departments. *Civil Litigation and Asset Recovery* was one of the three departments in *Legal Services Directorate*. The core business of the department of *Civil Litigation and Asset Recovery* was to advice the EACC on all legal issues, represent EACC in legal proceedings and file civil proceedings for recovery of illegally acquired properties. The department was basically an in-house legal practice so to speak. Investigations were done by the Directorate of ***Investigations and Asset Tracing,*** and if there is any asset recovery to be done, a complete file of asset tracing investigations is forwarded to *Civil Litigation and Asset Recovery.* The asset tracing investigations report constitutes the instructions for asset recovery. The judge and some members of *Civil Litigation and Asset Recovery,* who were duly appointed investigators for asset recovery, would conduct investigations on asset recovery but the investigation subject to these proceedings did not fall under that docket. See the official *Strategic Plan, Governance Manual* and the various *Annual Reports* by EACC and its predecessor Kenya Anti-corruption Commission (KACC) which are available in their official website.

[34] The structure was such that, *Civil Litigation and Asset Recovery* received instructions after investigations had been done by IAT. The applicant herein should therefore establish facts that show that the judge was involved in the subject investigations one way or the other in a manner that would suggest real possibility of bias or conflict of interest. On the basis of the operational structure of EACC, the fact of employment *per se* by EACC would not constitute possibility of bias or conflict of interest. Investigations at EACC were done in a manner that the officers in the relevant Directorate maintained full confidence and integrity of the person(s) under investigation and the process of investigations, and nobody else except the Director, Assistant Director and the relevant Principal Officer (and team leader) in charge of investigations could give instructions on the investigations. Investigation teams were constituted by the Director, Assistant Director and the relevant Principal Officer in charge of

investigations. The *Principal Attorney*, in the department of *Civil Litigation and Asset Recovery* was not involved in the investigation which is subject of this Petition. No evidence that has been tendered to show that the judge participated in any way or other in the investigations herein whatsoever.

[35] The above recapitulation of the facts of this case brings me to the point where I believe, and is the law, that a distinction must be made between real possibility of bias or prejudice on the part of the judge and mere apprehension of bias or prejudice. That law subserves legitimate interests of a litigant as opposed to individual desires that a certain judge should or should not hear its case, and its greater concern is to build an independent and robust judicial practice in the adjudication of cases. In the absence of cogent evidence, mere allegation of the judge's employment by EACC is not by itself a sufficient ground for judge's recusal from this case. If we were to go the way being suggested by the Petitioner, as an appropriate analogy, no single judge will be qualified to preside over a matter involving the Judiciary or Judicial Service Commission for these are the state organs who are our employers. There is no general rule that employment *per se* in a state organ automatically translates into likelihood of bias or conflict of interest on a former employee as the Petitioner wants the court to believe. Specific facts must be shown which constitute bias or conflict of interest on the part of the judge in each case. This has not been done here in the submissions of the applicant or through an affidavit or some other record or legally acceptable sources.

[36] I agree with the professor that the independence of the Judiciary and the judicial officers is the gravamen for fair trial. The independence encapsulates the ability of judicial officers to make decision on the applicable law and principles, fearlessly and impartially irrespective of the status of the parties before the court. It is for these reasons that I find nothing impairs my ability as a judge to fearlessly and impartially make a decision based on law in this matter. What the Petitioner is expressing is mere apprehension and fear devoid of any concrete basis of real likelihood of bias or conflict of interest as required by the law. In the circumstances of the case, I do not see anything that will result into my being a judge in my own cause. I reject the application for my recusal and order both this Petition and **BGM HC PET NO 1 OF 2012** to proceed before me to obviate any further delay.

[37] I thank counsels for the parties herein for their research, well grounded arguments and industry.

Dated, signed and delivered in open court at Bungoma this 30th day of January, 2012

F. GIKONYO
JUDGE

30/1/2013

Before: Gikonyo, Judge

Alusa: Court assistant

Maura for Ojienda for Petitioner
Kibellion for Ogoti for 1st and 2nd Respondent
Oira for Too for 3rd Respondent
Makali for Kayama for Interested Party
Ruling read in open court.

F. GIKONYO
JUDGE