REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

PETITION 84 OF 2012

IN THE MATTER OF ARTICLES 19.20,12,22,23 AND 160 OF THE CONSTITUTION OF KANYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF A RIGHT AND/OR FUNDAMENTAL FREEDOM UNDER ARTICLES 25,27,28,33,40,47 AND 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF RULE 11 OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES 2006

BETWEEN

ROBERT MWANGI .....PETITIONER

AND

SHEPHERD CATERING LIMITED.....1ST RESPONDENT

HON. LADY JUSTICE PAULINE NYAMWEYA.....2ND RESPONDENT

NAIROBI HOLDINGS LIMITED.....1ST INTERESTED PARTY

STEEL SONS LIMITED.....2ND INTERESTED PARTY

RULING

1. On 2nd May 2012, Mr. Odera, Counsel for the petitioner, made an application for me to recuse itself

from hearing this matter. The gist of Mr. Odera's argument is that I have already made up my mind at an ex parte stage and the petitioner was entitled to ask me to recuse itself and for the matter to be heard by an impartial judge. While arguing that he was not contending that I was biased, Mr. Odera nonetheless took the position that the petitioner was entitled to request that the matter be placed before an impartial court.

2. The petitioner first came before this court on the 19th of March 2012 seeking various orders in relation to proceedings in High Court ELC No. 359 of 2004. The orders were sough against Shepherd Catering Limited as the 1st Respondent, Hon. Lady Justice Pauline Nyamweya as the 2nd Respondent, Nairobi Holdings Limited and Steel Sons Limited as the 3rd and 4th Respondents respectively.

3. On that day, I certified the matter urgent but observed that this court did not have jurisdiction to supervise the conduct of another court of competent and concurrent jurisdiction. I also noted that the joinder of the judge presiding over HC ELC No. 359 of 2004 was erroneous. I nonetheless directed the petitioner to serve the respondents and for the parties to appear before me on the 26th of March 2012.

4. On the 26th of March, 2012, upon application by counsel for the respondents, Mr. Muite and Mr. Mwenesi for the 2nd and 1st respondents respectively, I granted the respondents time to file their respective replies but also directed the parties to address me on the question of jurisdiction before the matter could proceed further.

5. Following this direction, Counsel for the petitioner wrote to the Presiding Judge of the Division, Hon. Justice Lenaola, seeking to have the matter placed before any judge other than myself. The letter was not copied to me but a copy was availed at the hearing of the application for recusal on the 2nd of May 2012. The complaint to the Presiding Judge as contained in the letter was on the basis that this court had *suo moto* framed a point of law on which it wished to be addressed. Counsel for the petitioner observed that ***"With profound respect to the Judge, our understanding of our adversarial system of dispute resolution is that the competing claims of parties are presented by legal representatives who have interest in the outcome of the dispute before <u>"an Impartial third party"</u> with powers to impose authorities."***

6. Mr. Odera for the petitioner and Mr. Kihara who appears in this matter for the Interested Party took essentially the same position. Mr. Odera contends that the court is entitled to seek to be addressed on a particular point, but the position changes when the court seeks to be addressed on a point but takes a position on that point. In his view, the court has not only requested to be addressed on a point but has taken an unequivocal position on the point.

7. He argues that the words used by the court indicate that the court is clear in its mind that it has no jurisdiction. He therefore asked the court to allow another court to deal with the matter. He submitted that the petitioner was not saying that the court is biased but he was saying that no-one can be a Judge in his own cause.

8. Mr. Odera also submitted that it was not clear to the petitioner why the lawyers for the respondent were not being allowed to raise their objections.

9. Both Mr. Muite and Mr. Mwenesi for the respondents took the position that the application for me to disqualify myself was without merit, and the writing of letters seeking removal of a judge from hearing a matter as unfair and a practice to be discouraged.

10. Mr. Muite for the 2nd respondent asked the court to contextualise the circumstances in which the application for recusal was being made: The 2nd respondent, Lady Justice Nyamweya, made an order for reinstatement of a tenant. The orders were not obeyed; the petitioner then filed an application before Justice Nyamweya and she orders that the orders are first obeyed; the petitioner then files this petition, but the orders are not obeyed. He then makes this application intended to frustrate the hearing of this petition.

11. Mr. Muite noted that the petitioner's counsel states that he is not accusing the court of bias. He submitted that bias is the core ground on which a litigant can ask the court to recuse itself. If bias was not the petitioner's ground, he posed the question on what basis the application was being made. He noted that the court was being asked to recuse itself because it pointed out the clear provision of the Constitution at Article 160 and 165, yet on a clear reading of the Constitution, the divisions of the High Court enjoy concurrent jurisdiction; they are merely administrative divisions; that inviting the attention of counsel to these provisions cannot be bias.

12. Mr. Muite submitted that it was still open for Mr. Odera to amend the letter of the law and persuade this court that it has jurisdiction to supervise other divisions and urged the court not to allow applications such as this to derail the court.

13. Mr. Mwenesi for the 1st respondent submitted that the person asking for recusal is one Robert Mwangi who is admitting to being in contempt and has not purged that contempt. He submitted that what the court said was that it was of the view that it had no jurisdiction to hear the matter; it raised the issue of jurisdiction in exercise of its jurisdiction under Article 165. The court was entitled to raise the issue of jurisdiction, and he referred to the case of **Owners of Motor Vessel ("Lilian S" -v- Caltex Oil (Kenya) Ltd (1989) KLR 1** in which Justice Nyarangi J. said that jurisdiction is everything.

14. Like Mr. Odera, Mr. Kihara, while not so stating directly, supports the position that I should recuse myself on the basis that the direction made by the court give the perception that the court had made up its mind. He submitted that he was of the view that the direction was a mis-step and there may be need for the court to review the direction *suo moto.* Mr. Kihara also took objection to the submission that the court should contextualise the circumstances in which this application has been brought, arguing that the court made an order that the contempt should be purged but that the application for contempt before Justice Nyamweya was never heard.

15. No formal application with a supporting affidavit was made requiring me to disqualify myself. The essence of the petitioner's complaint is contained in the letter dated 27th March 2012 addressed to the Presiding Judge of the Constitutional and Human Rights Division Hon. Justice Isaac Lenaola. In that letter, Mr. Odera states as follows:

"While in principle we have no objection to addressing the judge on the issue as framed, we find it difficult to understand why the learned Judge would not accord the counsels on record for the Respondent, both senior counsels, the benefit of doubt, that they will and are more than capable of raising the relevant and or all points of law in defence of their respective clients.

With profound respect to the Judge, our adversarial system of dispute resolution is that the competing claims of parties are presented by Legal representatives who have interest in the outcome of the dispute before ' <u>an impartial third party</u>' with power to impose authorities."

16. Mr. Odera was at pains to show that he was not accusing me of bias, despite the contents of his letter to the Presiding Judge and the use of expressions like ***"an Impartial third party"*** and ***'no-one can be a Judge in his own cause.'***

17. I do not know of any basis on which the petitioner can properly ask me to disqualify myself if he is not alleging an interest in the matter that would lead to my lacking impartiality in my decision. I believe that as a judicial officer, based on my knowledge of and experience in the law and the Constitution, I am not precluded from making observations with regard to matters that come before me. This, I believe, is the practice before all courts, and it is then left open to the parties to persuade the court that the position is otherwise than observed. To take a different position on this would be to reduce the court to an unthinking robot that accepts without question everything that is placed before it.

18. For the petitioner to ask for my disqualification on the basis that I made an observation with regard to jurisdiction and that therefore I had made up my mind, while strongly urged by his Counsel, is ultimately a specious argument. As the court observed in the case of **Locabail (U.K.) Ltd. v. Bayfield**

Properties Ltd. and Another ***[2000] Q.B. 451.***

"In determination of their rights and liabilities, civil or criminal, everyone is entitled to a fair hearing by an impartial tribunal. That right…….is properly described as fundamental. The reason is obvious. All legal arbiters are bound to apply the law as they understand it to the facts of individual cases as they find them. They must do so without fear or favour, affection or ill-will, that is, without partiality or prejudice. Justice is portrayed as blind not because she ignores the facts and circumstances of individual cases but because she shuts her eyes to all considerations extraneous to the particular case."

19. I would also refer to the sentiments expressed by the Court of Appeal in the case of **R-v- Jackson Mwalulu Civil Appl. No. Nai 310 of 2004**(Unreported).

20. I believe the provisions of the law and the Constitution with respect to the jurisdiction of the court and the immunity of judicial officers in respect of acts done in the course of their functions are clear. However, it may be that the petitioner has a basis for believing otherwise, and this, as I indicated at the ex parte stage when I asked his counsel to serve his application and come before me for hearing, he was entitled to urge before me.

21. Had the petitioner been accusing me of having an interest in this matter, and could indeed show such interest and a likelihood of bias, then the position would be different. As the court further observed in the case of **Locabail (U.K.) Ltd**:

'The basic rule is not in doubt. Nor is the rationale of the rule: that if a judge has a personal interest in the outcome of an issue which he is to resolve, he is improperly acting as a judge in his own cause; and that such a proceeding would, without more, undermine public confidence in the integrity of the administration of justice."

22. I am constrained therefore to dismiss this application with costs to the respondents and direct that the parties take a date for hearing on the issue of jurisdiction.

23. I must observe in closing that this application demonstrates a worrying trend that bodes ill for the administration of justice in Kenya. It appears that parties wish only to appear before judicial officers whom they believe will rule in their favour. Yet, this is an adversarial system where one or the other side must win or lose. We also have two levels of appellate courts to which parties dissatisfied with a decision can appeal. For a party to write letters demanding disqualification of a judge at every whim will lead to a culture of forum shopping and leave the rule of law and administration of justice in a truly sorry state. It also amounts to a direct assault on the independence of the judiciary. It is a trend that I trust Learned Counsel, who are officers of the Court and have a large stake in the smooth administration of justice, will assist the judiciary in discouraging.

24. Should the petitioner wish to appeal against this ruling, I believe that he is at liberty to do so without leave but I nonetheless grant it in the event that it is required.

Dated Delivered and Signed at Nairobi this 22nd day of May 2012.

Mumbi Ngugi
Judge