



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Petition 170 of 2011

PATRICK CHEGE KINUTHIA & OTHERS.....PETITIONERS

VERSUS

THE HON. ATTORNEY GENERALRESPONDENT

RULING

1. The petitioners filed the Notice of Motion dated 25th April 2012 seeking orders, inter alia, that I recuse myself from hearing or in any manner handling or determining this matter. The application is supported by the affidavit of **Mr. Rumba Kinuthia, Advocate**, sworn on the 25th of April 2012, and a supplementary affidavit sworn by **Mr. Patrick Chege Kinuthia**, one of the petitioners, also on the same date. It was argued before me on the 2nd of July 2012 by Mr. Okindo for the petitioners and Ms. Mumasaba for the respondent.

2. The gist of the petitioners' application is that I should recuse myself from hearing this matter as I have displayed what Mr. Kinuthia terms in his affidavit as ***'open bias in favour and bias towards the state, by literally litigating on behalf of the Attorney-General...'***

3. I have carefully read both the application and the affidavits in support, and considered the very brief submissions made before me by counsel for the parties. From the tenor and content of the affidavit by Mr. Kinuthia, which forms the substance of the application before me, this application arises more from Mr. Kinuthia's dissatisfaction, for want of a better word, with the judgments that I have rendered in matters to which he has been a party or in which he or his firm have appeared for the parties. Among other averments with regard to those decisions, it contains a number of unfounded accusations pertaining to one matter in particular that is currently proceeding before me.

4. At paragraph 8 of his affidavit, Mr. Kinuthia accuses me of ruling that the petitioner in **Petition No. 220 of 2010**, whom he avers suffers from a mental disorder, should give viva voce evidence against her will and against the provisions of the Gicheru Rules, and thus causing her to suffer a mental breakdown. He then claims that as a result of the mental breakdown the matter had to be adjourned.

5. A perusal of the record in **Petition No. 220 of 2010** will reveal the following:

i. On the **6th of December, 2010**, in the presence of Mr. Matwere for the petitioner and Ms. Keli for the respondent, **Justice Musinga** directed that ***'Hearing to proceed by way of viva voce evidence after which the parties shall file their respective submissions.'***

ii. On the 14th of November, 2011, Mr. Okindo for the petitioner applied to vary the orders of Justice Musinga and for consolidation of Petition No. 220 of 2010 and 34 of 2010. Mr. Nthiga for the state objected to the variation of the orders, upon which Mr. Okindo indicated to the court that ***'We have agreed that the files be consolidated but that the orders for viva voce evidence remain.'***

iii. On all the occasions that the matter was before me, at no time did Mr. Matwere for the petitioner indicate that his client had a problem that would be exacerbated by testifying in court. The petitioner was in court on the 26th of January 2012, and again on the 7th of February 2012 when she testified and completed her evidence. Her counsel then applied for an adjournment to enable the petitioner call her other witnesses, a Dr. Magoda and Dr. Gaku.

6. To allege on oath that I ruled that the petitioner give viva voce evidence against her will, thereby occasioning her mental breakdown, when the record is so clear with regard to the directions for viva voce evidence, is to be patently dishonest on the part of Mr. Kinuthia. This is particularly so given that the directions for viva voce evidence were given by another Judge altogether, I had no knowledge of the mental state of the petitioner, and her inability or unwillingness to testify was never drawn to my attention prior to or at any point during the hearing.

7. It is also a well-known practice of this court that where matters of fact pertaining to violation of constitutional rights are contested, the court will hear the petitioner by way of viva voce evidence. This has been the practice from as long ago as 2004 in the celebrated case of Dominic Amolo Arony-v- The Attorney General High Court Misc, Civil Application No. 494 of 2003 where the three judge bench of the High Court took all the evidence from the petitioner's three witnesses orally.

8. As a senior member of the bar, Mr. Kinuthia must be fully aware of the law and the rules of procedure and evidence, and he is also fully aware of the law with regard to bias. The law has been quite succinctly put in the case of ***Locabail (U.K.) Ltd. v. Bayfield Properties Ltd. and Another [2000] Q.B. 451***, and by our Court of Appeal in the case of ***R-v- Jackson Mwalulu Civil Appl. No. Nai 310 of 2004 (Unreported)***. The duty of judges and of all legal arbiters is, in the words of the Court in the case of *Locabail (U.K.) Ltd. v. Bayfield Properties Ltd. and Another (supra)* ***'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.***

9. I have no personal interest in the matters that come before me. The fact that I render judgment in one manner or another does not amount to bias, and the respective records of the matters referred to in Mr. Kinuthia's affidavit speak for themselves. Should a party be dissatisfied with my decisions, then the normal practice is to lodge an appeal, which I believe has been done in all the matters cited. Should I have made errors of law or fact, then the Court of Appeal will set the matter right. For Mr. Kinuthia to embark on a highly personalised attack of the kind displayed in this matter is highly regrettable.

10. I will not defend my insistence that the Attorney General participates in matters that have a bearing on the public. The Attorney General is not an ordinary party. He has the constitutional duty and mandate to defend the public interest conferred upon his office by Article 156 of the Constitution. To insist that he is present and that he defends the interests of the state, to which the people of Kenya have vested their sovereign power, is to insist that he defends the interests of the people of Kenya, including the petitioners. It does not in any manner or form constitute bias.

11. There is no basis in law for me to disqualify myself from hearing this matter. However, the contents of the affidavits filed in support of the application, particularly the affidavit sworn by the Advocate whose firm is on record for the petitioners, Mr. Rumba Kinuthia, display a personal antipathy that colours, in an extremely negative light, the petitioners' attitude and perception towards this court. It is a totally unfair perception, but it is there nonetheless.

12. It is noteworthy, for instance, that the petitioners' claim dates back 20 years to the early nineteen nineties. They filed this petition on September 23 2011, and it first appeared before me on the 2nd of November 2011, but the impression is given in the submissions and pleadings that this court has

deliberately denied them justice for the last 20 years. Whatever decision this court would arrive at would be coloured by the perception that has been implanted in the petitioners' minds, and this would not be in the interests of justice.

13. In the circumstances, I am referring this matter, and all the other matters arising out of the Nyayo House torture chambers in which Mr. Kinuthia's firm is on record, to the Presiding Judge of this Division to appoint another judge to hear and determine.

Dated Delivered and Signed at Nairobi this 31st day of July 2012.

**MUMBI NGUGI
JUDGE**