REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 78, 79, 80 & 81 of 2010

HON. GITOBU IMANYARA …..…..……. 1ST PETITIONER

TONY GACHOKA ……..…….…. 2ND PETITIONER

HON. NJEHU GATABAKI …..……...…… 3RD PETITIONER

BEDAN MBUGUA …..... 4TH PETITIONER

AND

HON. ATTORNEY GENERAL …..... RESPONDENT

RULING

Introduction

1. When this matter came up for directions on 25th October 2012, Hon. P. Muite, S.C., applied for me to disqualify myself from hearing this matter. I directed him to file a formal application on the matter and this decision is the determination on whether I should recuse myself from these proceedings.

The Application

2. By a Notice of Motion dated 31st October 2012, the petitioner in Petition No. 81 of 2010, Honourable Gitobu Imanyara, seeks the following main orders;

(1) That Honourable Justice David Majanja do disqualify himself from hearing and determining petition 78 of 2010 consolidated with petitions Number 79, 80 and 81 of 2010.

(2) That the petition file be referred to the head of the division or chief Justice to appoint a bench to proceed with hearing petition 78 of 2010 consolidated with petitioners 79, 80 and 82 of 2010.

3. The application is supported by the affidavit of Honourable Gitobu Imanyara sworn on 31st October 2012. There are three main factual grounds requesting my disqualification from these proceedings. It is conceded by Hon. Muite, S.C., that I am not accused of having a direct or pecuniary interest in the subject matter of the suit.

The facts

4. The application relates to events occurring prior to my appointment as judge of the High

Court in September 2011. At the time material to these events I was a partner in the firm of ***Mohamed and Muigai Advocates*** (the firm). One of the partners in the firm was the Hon. Githu Muigai, the current Attorney General of the Republic of Kenya and whose office is the respondent in these proceedings.

5. During my term at the firm, Hon. Gitobu Imanyara instituted civil proceedings against the Standard newspaper for defamation. The insurers of the Standard took up the matter on its behalf and instructed the firm to defend the matter. The case was ***Gitobu Imanyara v Wachira Waruru and The Standard*** **Nairobi HCCC NO. 219 OF 2003.**

6. It is alleged by the applicant that during the course of the proceedings, out of court discussions commenced but the firm advised against settlement of the matter. Hon. Imanyara depones that he believes that at the time I was handling the file and that I advised against settlement because of a criminal conviction which is the subject matter of one of the prayers in the petition. I am therefore accused of advising against the settlement while at the same time actively requesting counsel to indicate the kind of damages I was claiming. Annexed to the affidavit is a letter dated 24th February 2005 which is a letter I signed requesting the applicant's advocates to make settlement proposals. I am accused of proceeding to file an application for dismissal of my suit for want of prosecution but the application was dismissed.

7. The second complaint is that at the same time while the firmwas acting for the Standard in the suit against Hon. Imanyara., his son, who had just graduated with honours degree in Law from Warwick University, approached him with a request that he wished to serve his pupillage with the firm. Hon. Imanyara states that he approached one of the partners of the firm with his son's request and after a week, the partner informed him that the firm could not take his son to serve his pupillage because of opposition from me.

8. Hon. Imanyara depones that he was surprised because he had never had any disagreement nor has he ever held any ill feelings towards me. Hon. Imanyara contends that I have unexplained incomprehensible antipathy towards him and his family and he is apprehensive this may manifest adversely on him should I continue hearing this petition.

9. Another complaint the applicant has raised is that at the time I was being appointed or had just been appointed a judge of the High Court, one Tabitha Njeri Kihara, the plaintiff in ***High Court of Kenya Civil Case No. 698 of 2003 Tabitha Njeri Kihara versus Kenya Hospital Association t/a The Nairobi Hospital and Andrew Kibet*** appointed Hon. Imanyara to take up her matter from the firm. Tabitha Njeri had filed a complaint against the firm but during the process of taking the file, accusations were made that I was handling the file while at the firm and if the file came to applicant, he would, it is alleged to try and embarrass me and Attorney General, Hon. Githu Muigai.

10. The final complaint is that I dismissed an application by the petitioners seeking to refer the matters to the Chief Justice to empanel bench of not less than three judges to hear and determine the matter under **Article 165(4)** of the Constitution. The ground for the application was that the matter raised substantial issues of law given the nature of the disparities that the courts have shown when awarding damages in human rights cases. The applicant states that I dismissed the application and thereby gave the impression that I was determined to hear these petitions myself sitting as a single judge. According to the applicant my conduct does not give him confidence that justice will be done or indeed be seen to be done.

<u>The Submissions</u>

11. Hon Muite S.C., counsel for the petitioners, reiterated the facts as set out above. Counsel emphasised that this application is brought against the background of Hon. Imanyara's suffering under the one party regime. Counsel emphasised that this case represented an opportunity to vindicate his rights and that he should be granted wide latitude in presenting the case to a tribunal that is sympathetic. Counsel further submitted that the facts which have been outlined from the point of view of a reasonable person demonstrate that Hon. Imanyara would not obtain fair trial in the circumstances.

12. The State, represented by Mr Kamau, opposed the application on the ground that no basis had been laid nor reasons advanced for recusal. Counsel submitted that no evidence was given or laid to support these allegations. As regards, the composition of the three judge bench, counsel stated that this was a matter in the court's discretion and that the petitioners cannot be permitted to forum shop.

General Principles

13. Requesting the recusal of a judge is a serious matter going to the heart of the administration of justice and that is why the Court of Appeal in ***Galaxy Paint Company Ltd v Falcon Guards Limited*** **Nairobi Civil Appeal No. 219 of 1998 (Unreported)** stated that, ***"Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge they will have their case tried by someone thought to be more likely to decide the case in their favour."***

14. The petitioner's complaint is in relation to the perception or apprehension of bias on his part in regard to the incidents I have outlined above. In this case, therefore, the test applicable in determining this matter is to be found in the case of ***Attorney General of Kenya v Prof Anyang' Nyong'o and 10 Others*** **EACJ Application No. 5 of 2007 (Unreported)**where the court stated, ***"We think that the objective test of "reasonable apprehension of bias" is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the mind of the reasonable, fair minded and informed member of the public that the judge did not (will not) apply his mind to the case impartially. Needless to say, litigant who seeks disqualification of a judge comes to court because of his own perception that there is appearance of bias on the part of the judge. The court however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair minded and informed about all the circumstances of the case."***

15. In this, I would add the dicta of Tunoi JA., in ***Republic v David Makali and Others,*** **CA Criminal Application Nos NAI 4 and 5 of 1995 (Unreported)** where he 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....."***

16. In addition, I fully adopt the sentiments of Justice G. B. M. Kariuki in the case of ***RPM v PKM*** **Nairobi Divorce Cause No. 154 of 2012 (Unreported)**, where he stated, ***"The test to be applied to ascertain existence or otherwise of bias is whether a reasonable man or woman, or a Wanjiku so to speak, appraised of the facts would be apprehensive that justice might not be done or that there would be real likelihood of bias. Where there is reasonable suspicion based on ascertainable materials that justice, even if done, may not be seen to be done, the court should be disinclined to hear the matter. The terms real likelihood and reasonable suspicion are however not interchangeable or analogous. The former calls for a slightly higher degree of proof than the latter. In matters such as this where assurance of the integrity of the court decision is paramount as it leads to public confidence in the system of justice and hence in the Judiciary which is enjoined by the Constitution to give the citizenly justice, the test to be applied is that of a reasonable man or a Wanjiku."***

17. Finally, I would be remiss if I did not set out what the ***Judicial Service Code of Conduct and Ethics*** states about disqualification. It enjoins every judicial officer to ensure compliance with its Rules. **Rule 5** which provides as follows

DISQUALIFICATION

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.

Determination

18. It is now my duty to examine the facts as deposed in detail and determine whether the test for disqualification is met. I must point out that it is not in dispute that I was a partner in the firm until the end of the year 2007 and it is also not in dispute that I acted for the Standard in a matter that Hon. Imanyara had filed a claim for defamation.

19. A judge appointed from private practice is expected to have dealt with various matters, parties and advocates and to insist that a judge recuse himself or herself from every matter he had contact with would not only be unreasonable but also undermine justice as a whole. **Rule 5** of the ***Judicial Service Code of Conduct and Ethics*** specifically refers to the judge disqualifying himself where he acted if it is the matter in controversy.

20. I do not think that the fact that I dealt with a matter concerning the Hon. Imanyara should disqualify me from dealing with the matter particularly where the matter is a separate and different cause of action. In the ordinary cause of business, an advocate's duty is to advance and protect the interests of his client. It would follow that as an advocate in the firm, I was not under any obligation to promote or advance Hon. Imanyara's cause. The fact that my obligation was adverse to the plaintiff should not be construed as a matter of ill-will or spite against Hon. Imanyara as it is the ordinary duty of an advocate to represent his or her client including the filing of an application for dismissal of a suit where rules permit.

21. I must also point out that in seeking recusal of a judge, the applicant must furnish facts and evidence upon which the necessary inferences may be made. The applicant accuses the judge of advising the client not to settle the matter. The applicant does not state when such opinion was proffered and whether it was indeed proffered by the judge. No written opinion is attached nor source of information revealed or disclosed in the deposition. In this respect, the applicant has failed to discharge his obligation to set out the material facts.

22. As regards the applicant's son, the deposition does not specifically disclose the source of information that it was the judge who specifically declined to admit his son to pupillage atthe firm. In any case, the connection between the petitioner's son's pupillage and the case at hand is tenuous and no reasonable person having knowledge of the facts deponed to would conclude that I would be biased.

23. The other issue relates to the case of Tabitha Njeri Kihara. Firstly, the accusation relates to taking over the file by Hon. Imanyara from the firm. By the time I was appointed judge, I had left the firm over three years and it was not possible for me to be dealing with the matter. Indeed the letter attached to the affidavit only shows that I advised the client her matter had been adjourned generally. Secondly, no complaint regarding my conduct when representing the said Tabitha Njeri Macharia has been brought to my attention nor are the particulars disclosed by Hon. Imanyara in the deposition. Over four years have now elapsed since I dealt with the matter and if there were any complaints about my conduct, such complaint ought to have been raised even at the time I was being considered for appointment as a judge.

24. The final issue relates to the application made under **Article 165(4)**. The constitution of a three judge bench is entirely a matter within the discretion of the judge. The application was made by the petitioner and duly determined. In my ruling I stated as follows, *"**Article 165(4)** gives a judge of the High Court discretion to refer a matter concerning interpretation of the Constitution where the matter raises substantial questions of law to the Chief Justice. The Jurisdiction is not conferred to the judge by consent of the parties. It is to be exercised on the basis of the matters before the court. The issue raised is that*

the damages awarded by several judges in similar cases are inconsistent and it is a matter that should be resolved by a three judge bench. I do not think that this issue in itself is a substantial question to be resolved by a three judge bench. After all, the judgment of a three judge bench is of equal precedential value to that of one judge and the bench will not resolve the issue. A three judge bench has dealt with this issue in the case of ***Dominic Aroni v the Attorney General Nairobi HC Misc. 494 of 2003 (Unreported)*** *and it is now the Court of Appeal to deal with these inconsistencies, if any. In the circumstances, I reject the application."*

Disposition

25. Having considered the facts as presented by the petitioner and looking at the matters objectively, I do not think a reasonable person with knowledge of the facts of the case would conclude I would be biased. The application for my recusal lacks merit and is not well founded.

26. However, I note that Hon. Imanyara feels strongly that I should not handle this matter particularly given his history of suffering which is well known to Kenyans at large. This is his opportunity to vindicate his rights and I will not stand in his way. In the circumstances, I refer the matter to the Head of the Constitutional and Human Rights Division to assign the matter to another judge.

27. The application for the constitution of a three judge bench was one made on merit and I do not see any grounds that have been set out to review the decision.

DATED and **DELIVERED** at **NAIROBI** this 4th day of December 2012

D.S. MAJANJA

JUDGE

Hon. P. K. Muite, S.C., with him Mr Kounah instructed by Kounah and Company for the petitioners.

Mr W. Kamau, Senior Litigation Counsel, instructed by the State Law Office for the respondent.