



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ELECTION PETITION NO. 24 OF 2008

BERNARD CHEGE MBURU PETITIONER

VERSUS

CLEMENT KUNGU WAIBARA1ST RESPONDENT

CHARLES MARARO NJOROGE2ND RESPONDENT

ELECTORAL COMMISSION OF KENYA3RD RESPONDENT

R U L I N G

The 1st Respondent, **CLEMENT KUNGU WAIBARA**, has moved the court by way of a Notice of Motion premised on **Section 3A of the Civil Procedure Act**, as read together with **Order 51 of the Civil procedure Rules**. Through that application he seeks orders that

“the Honourable Mr. Justice Ochieng be pleased

to recuse himself from these proceedings.”

The said application is based on three substantive grounds, namely;

“1. In examining all the following circumstances of the case, there is a real danger or possibility of bias and/or prejudice against the 1st Respondent.

2. In the premises of the aforesaid matters, the

impartiality of the learned judge is highly questionable.

3. The recursion of the Hon. Mr. Justice Ochieng from these proceedings would further the interest of justice.”

Under the substantive ground numbered 1 above, the 1st Respondent enumerated a total of eleven (11) circumstances, from which he says that there was evidence of real danger or possibility of bias and or prejudice against him. I will delve into the said circumstances in due course.

But first, Mr. Odera, the learned advocate for the 1st Respondent made it clear to the court that his client has an unshakable belief that this court’s ability, competence and integrity are beyond reproach.

However, because the court had made specific controversial or inconsistent decisions, the 1st Respondent now believes that the court was unlikely to be impartial and fair to him, if it continued presiding over the proceedings herein.

The first instance cited by the 1st Respondent was that on 10th of January 2011, the court allowed Mr. Muthomi, the learned advocate for Mr. Patrick Muiruri to address the court, when the said Mr. Muiruri was not a party to the proceedings.

At this point it is important to explain how Mr. Muiruri is connected to the proceedings. He filed an application dated 23rd September 2010, seeking to replace or substitute the current petitioner, Mr. Bernard Chege Mburu.

When the application was served on the parties, the 1st Respondent filed a Notice of Preliminary Objection. The Preliminary Objection was canvassed before me on 18th November 2010.

On 8th December 2010, I delivered my ruling, in which I upheld the said Preliminary Objection. Effectively, the court dismissed the application dated 23rd September 2010.

The reason for the dismissal of the application was that the current petitioner had not expressed any desire to withdraw the petition. If anything, he had expressed the desire to prosecute the petition. Therefore, the court held that he could not be substituted, simply because Mr. Patrick Muiruri was suspicious of the intentions of the current petitioner.

In the same ruling dated 8th December 2010, the court held that if it were to determine the question as to whether or not there was security for costs, that would constitute an exercise which went beyond the realm of a preliminary objection.

I nonetheless stated that there was on record, in the court file, a letter from M/S Mohamed Muigai Advocates, dated 29th September 2008, asking the court to treat the sums which they had earlier deposited in court as security for costs on behalf of the original petitioner, as security for the costs payable by the current petitioner.

The court concluded that aspect of the ruling by finding that, on a prima facie basis, it appears that the current petitioner did provide security for costs.

As at the date when I delivered the ruling, on 8th December 2010, I was not aware that the original petitioner, Mr. Peter Kamau Njeri had already filed an application in court.

On 10th December 2010 the application was brought to my attention, by the learned Deputy Registrar of this court. I immediately directed the said Deputy Registrar to list the application for inter-partes mention on 15th December 2010. Meanwhile, the application was to be served on the respondents thereto.

On 15th December 2010, I directed that the application be listed for hearing before me, on 10th January 2011.

When the case was called out at 9.00a.m. on 10th January 2011, the 1st Respondent, the 2nd Respondent and the 3rd Respondent were not present. Secondly, the original petitioner, Peter Kamau Njeri was also not in court.

Those who were represented in court, at that hour, were Mr. Muiruri and the current petitioner.

Mr. Muthomi, the learned advocate for Mr. Muiruri began by informing the court that his law firm had been served with the application dated 25th November 2010. He also informed the court that subsequent to the said service, he had become aware of an affidavit filed by Peter Kamau Njeri.

Mr. Muthomi asked the court to issue sanctions against the advocates who had filed the application dated 25th November 2010. His said request was based on the contention that Mr. Peter Kamau Njeri had denied having instructed the firm of Ngugi Mwaniki & Co. advocates, to bring the application dated 25th November 2010.

As far as Mr. Mutnoni was concerned, someone had possibly committed criminal offences, **contrary to sections 170, 349 and 351 of the Penal Code.**

He also expressed the view that the actions complained about, revealed possible misconduct of a professional nature, because the actions were in breach of **Rule 7 of the Oaths & Statutory Declaration Rules.**

Subject to the foregoing, Mr. Muthomi expressed the wish to have the hearing of the election petition commence on that morning, of 10th January 2010.

As Mr. Muthomi was concluding his remarks, Mr. Mukuria, the learned advocate for the 2nd and 3rd Respondents walked into court. He tendered his apology to the court.

Mr. Odera, the learned advocate for the 1st Respondent arrived in court after Mr. Mukuria Advocate. He too, tendered his apology to the court.

It is then that the advocate for Mr. Peter Kamau Njeri walked into court. He is Mr. Gachomo.

The said learned advocate dutifully apologized to the court, for arriving late.

Having heard the advocates, the court directed as follows;

***“In the light of the fact that Mr. Gachomo advocate has arrived late in court, I direct that the hearing of the Petition proceeds forthwith.*”**

The applicant may, if he is so minded, move the court at a later date, on the application dated 25/11/10.”

At that point in time, Mr. Odera advocate informed the court that he had lodged an appeal in relation to the ruling dated 8th December 2010. He said that the appeal had been filed on 14th December 2010, challenging the finding that the security for costs which had been deposited by the original petitioner, had been transferred to the current petitioner.

As far as the 1st Respondent was concerned, it was surprising that in arriving at that finding, the court had relied upon a letter which none of the parties had drawn to its attention.

The 1st Respondent also informed the court that he had filed an application for stay of these proceedings. The said application had been filed in the Court of Appeal, under a certificate of urgency.

In the light of those developments, the 1st Respondent was of the view that it was critical for the Court of Appeal to address the issue of the security for costs.

He asked this court to allow the Court of Appeal the opportunity to address the issue, before the petition could proceed to hearing. It was his view that if the petition was heard before the Court of Appeal addressed the issue of security for costs, the issue would be swept under the carpet.

Furthermore, the 1st Respondent felt that because the application dated 25th November 2010 was set down for hearing on 10th January 2011, it could be unfair to compel them to proceed with the petition, especially before the application was determined. He said that he had only prepared himself to handle the application on that day.

The 1st Respondent also expressed the view that the application dated 25th November 2010 raised a fundamental issue of jurisprudence in Election Petitions. The said question was whether the original petitioner could either withdraw his security for costs or could have it transferred to the petitioner who substituted him, without an order of the court.

If the court was minded to proceed to hear the petition when the application dated 25th November 2010 was still outstanding, the 1st Respondent asked the court to put-off the matter to the following day. In his considered opinion, the adjournment of one day would accord fairness to him.

Finally, Mr. Odera advocate said that if the court could not adjourn the case for one day, he would be obliged to withdraw from acting for the 1st Respondent, because he was not prepared to proceed with the petition on 10th January 2011.

In answer to the 1st Respondent, the Petitioner pointed out that on 8th December 2010, the court had made it clear that the petition would be heard from 10th January 2011.

Although he, too, had prepared himself to first argue the application dated 25th November 2010, Mr. Achach, the learned advocate for the Petitioner, said that he needed only a few minutes to make himself ready to proceed with the petition. However, he did not mind having the hearing of the petition start on 11th January 2011.

Thereafter, Mr. Mukuria, the learned advocate for the 2nd and 3rd Respondents, said that in his view, the fact that Mr. Peter Kamau Njeri had lodged an application seeking the withdrawal of the security he had deposited in court, implied that the said security was indeed still being held by the court.

He also noted that since 2008, when the Petition was filed, the court has only dealt with interlocutory applications. He therefore felt that it was about time that the hearing of the petition commenced.

Mr. Muthomi advocate then addressed the court. He said that the issues being raised by the 1st Respondent were *res judicata*.

In his view, the court had already ruled that there was security for costs.

He also expressed the view that too many applications had been brought in the petition. He therefore asked the court to proceed to hear the petition.

When Mr. Odera advocate rose to respond to the submissions, he said that the 1st Respondent was not opposed to proceeding with the petition. He said that he was only seeking an adjournment to the next day, because as for the 10th January 2011, he had only prepared for the application dated 25th November 2010.

At that point, Mr. Odera advocate also took issue with the court for having allowed Mr. Muthomi to address it. In his view, the presence of Mr. Muthomi in the court record, would only muddle-up the record of the proceedings.

Having heard the competing submissions, I did allow the request by the 1st Respondent, to adjourn the hearing of the petition to 11th January 2011.

In the same vein, I did hold that the petition could not be kept waiting by a party who chooses to arrive late. It was for that reason that I directed the original petitioner to seek another date for his application dated 25th November, 2010.

I also held that until the Court of Appeal ordered that these proceedings be stayed, the fact that the 1st Respondent had applied for stay could not cause me to stay the proceedings.

On 11th January 2011, the 1st Respondent informed the court that he wanted time to file a formal application for my disqualification.

Although his request was opposed by the 2nd and 3rd Respondents, the court allowed him the time he sought.

On 12th January 2011, the application was canvassed.

When canvassing the application, the 1st Respondent said that it was the advocate for the original petitioner who produced the affidavit sworn by the said original petitioner, Peter Kamau Njeri.

That contention is in tandem with the affidavit of the 1st Respondent in which it was deponed as follows;

“5. THAT amazingly, on the 10th day of January 2011, the firm of Mohamed Muigai & Co. Advocates, not being on record for any of the parties, addressed the court and purported to serve an affidavit negating the position taken by the Former Petitioner in the aforesaid application.”

A reading of the record of the proceedings, as set out above, shows that by the time Mr. Muthomi advocate addressed the court on 10th January 2011, the 1st Respondent was not present in court. In any event, Mr. Muthomi did not present the affidavit of Mr. Peter Kamau Njeri to the court. He only said that he had become aware of the said affidavit, and that he was therefore drawing the court's attention to it.

Indeed, Mr. Odera advocate appeared to be aware of the fact that the affidavit in issue was not filed by M/S Mohamed Muigai Advocates, but by the original petitioner, personally.

If only the 1st Respondent had been in court at the appointed time, he would have been able to raise an objection, if he was so minded, to having Mr. Muthomi advocate address the court. Surely, the 1st Respondent cannot seek to challenge what happened in his absence by blaming the court.

And if the court erred by allowing Mr. Muthomi advocate to address it, I believe that the 1st Respondent still has recourse. That is more so because the application dated 25th November 2010 is still very much alive.

By asking me to disqualify myself, I cannot understand how the 1st Respondent can get the answer to his question regarding why I allowed Mr. Muthomi advocate to address the court. And, in any event, I did not grant to Mr. Muthomi advocate any of the prayers he sought.

The 1st Respondent submitted that the court had, in any event, already side-stepped the application dated 25th November, 2010.

The record shows that the court simply told the applicant that he could have his application fixed for hearing on another date. If that is what the 1st Respondent means by the court side-stepping the application, so be it. But the fact is that the said application is still pending, and can always be fixed for hearing.

The decision to proceed with the petition was made because the applicant in the application dated 25th November 2010 was late in coming to court.

And whilst it is factually correct that that decision was made after Mr. Muthomi advocate had drawn the court's attention to the affidavit of Peter Kamau Njeri, it cannot also be true that I did hear Mr. Muthomi after side-stepping the application.

After the court adjourned the petition to 11th January 2011, it invited Mr. Gachomo to read the record of the proceedings on 10th January 2011. The court drew the said advocate's attention to the issues raised by Mr. Muthomi.

In particular, the court indicated that it did not know whether or not the original petitioner had actually instructed Messrs Ngugi Mwaniki Advocates to file the application dated 25th November 2010.

I pointed out to Mr. Gachomo that in the light of the contradictory positions taken by the original petitioner, there may well be need for investigations to be carried out by the police, to ascertain the correct factual position.

I made it clear that because the affidavit sworn by Peter Kamau Njeri, on 30th December 2010, had been brought to the attention of the court, that fact influenced my decision to put-off the hearing of the application, as I felt that the applicant and his lawyers may need time to give consideration to the position of the original petitioner.

Mr. Gachomo responded by telling the court that he would give due consideration to the issues I raised.

Given the foregoing facts, the issue of the court having castigated the advocate for the original petitioner, did not arise at all.

I do reiterate, that because the original petitioner appears to have sworn two (2) affidavits, whose contents are completely at variance, that could lead to criminal investigations. To my mind, that is the correct legal position. It does not amount to the castigation of Mr. Gachomo, by the court.

Indeed, the views I expressed at that time cannot, in my considered opinion, be described as a failure by the court, to deal with issues of perjury by the former lawyers.

By alerting the advocate for the original petitioner to what had been brought to the attention of the court in his absence, the said court cannot, with respect, be said to be sweeping aside the issue of possible perjury.

Mr. Odera submitted that the court has an animated desire to proceed with the petition, whilst side-stepping the application addressing the issue of security for costs.

I have, in my ruling dated 8th December 2010, stated that;

“On a prima facie basis, therefore, it appears that the current petitioner did provide security for costs.....”

That prima facie finding was based on the letter from Mohamed Muigai Advocates, dated 29th September 2008.

None of the parties had drawn the court's attention to the said letter. And in my ruling dated 8th December 2010, I made it clear that I did come across the said letter, in the court file.

Was I wrong to have given consideration to the said letter? I believe that I was not wrong. But, if I was not right, I believe that there is room for the 1st Respondent or any other party who felt aggrieved with that finding, to challenge it, by way of an appeal, or by any other procedure they deem to be best suited for the purpose.

If, as Mr. Odera advocate submits, my conclusion constituted of twisted logic, I believe that he should find it extremely easy to so persuade the appellate court.

I cannot understand why the 1st Respondent would choose not to challenge such a twisted finding, as he alleges; but to seek to use it as a basis for having me disqualify myself.

The 1st Respondent says that I have an animated desire to proceed with the hearing of the petition, even through the Court of Appeal is yet to hear either the appeal or the application for stay of proceedings.

As the 2nd and 3rd Respondents submitted, I hold the view that the court ought not to be faulted for striving to have the petition heard expeditiously. One would have expected a commendation for a court that tried to handle the petition expeditiously. By so doing, the court would indeed be complying with the legal requirement, that Election Petitions be heard and determined expeditiously.

But if the Court of Appeal were to order this court to stay further proceedings pending the hearing and determination of the appeal, or pending any other appropriate order, this court will comply.

I cannot agree with the 1st Respondent's contention that simply because he had an application for stay of proceedings, pending before the Court of Appeal, I should stay these proceedings. There is no law that requires me to do so. And the very fact that the 1st Respondent has filed an application for stay of proceedings suggests that he too is fully aware that proceedings before the High Court would not ordinarily be stayed automatically as soon as an appeal was lodged with the Court of Appeal, or as soon as the appellant filed, before the Court of Appeal, an application for stay of proceedings.

To suggest that I am not acting above-board because I have declined to stay these proceedings until

either the Court of Appeal deals with the issue before it, is evidence of possible bias on my part, is completely unjustified, in law.

The 1st Respondent has submitted that this court was working in concert with the petitioner. His reason for so saying has not been disclosed to this court.

Indeed, as the 2nd and 3rd Respondents commented, had the court been acting in concert with the petitioner, the easiest thing would have been to dismiss the application dated 25th November 2010, when the applicant was not present in court, at the time the matter was called out. But I did no such thing. Instead, I gave to the original petitioner an opportunity to have the said application canvassed at a later date.

On his part, Mr. Achach the learned advocate for the petitioner, submitted that this court had acted above-board. The petitioner therefore feels that the allegations of possible bias, on the part of the court, were mere side-shows.

In **REX Vs SUSSEX JUSTICES [1924] 1 K.B 256**, Lord Hewart C.J. expressed himself thus, at page 259;

“.....it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.

Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice. “

Some 44 years after Lord Hewart made that pronouncement, Lord Denning M.R elaborated on the applicable test, in **METROPOLITAN PROPERTIES CO. (F.G.C.) LTD Vs LANNON & OTHERS [1968] 3 ALL, E.R. 304**, at page 310, when he said that in determining the question as to whether or not there was real likelihood of bias;

“There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did favour one side unfairly at the expense of the other. The court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: ‘The Judge was biased’ ”.

Those authorities were cited by the 1st Respondent, to demonstrate the test that is applicable in cases in which a Judge is being asked, by a party, to disqualify himself from the particular case.

The said tests have been applied by the Court of Appeal in **KING WOOLEN MILLS LIMITED & ANOTHER Vs STANDARD CHARTERED FINANCIAL SERVICES LTD & ANOTHER, CIVIL APPEAL NO. 102 of 1994.**

In that case the Court of Appeal concluded that for a judge to disqualify himself a reasonable and fair minded person sitting in court, and knowing all the relevant facts, would have a reasonable suspicion that a fair trial for the appellants would not be possible.

In the case of **LOCABAIL LTD Vs BAYFIELD PROPERTIES [2000] 1 ALL E.R 65**, at Page 78, that;

“The mere fact that a Judge, earlier in the same case or in a previous case, had commented adversely on a party or a witness, or found the evidence of a party or a witness to be unreliable, would not without more found a sustainable objection.”

But the question which now needs to be answered is who is to determine what the reasonable and fair minded person sitting in court would say, if faced with the situation in which a judge is being asked to disqualify himself. Surely, the court would not be expected to go out into the streets to look for such a reasonable and fair-minded person.

The answer is to be found in the case of **REPUBLIC Vs MWALULU & 8 OTHERS [2005] 1 KLR 1**, wherein, the Court of Appeal restated the following words of Tunoi J.A in **REPUBLIC Vs DAVID MAKALI & 3 OTHERS, CRIMINAL APPLICATION NOS. NAI 4 & 5 of 1994;**

“That being the position as I see it, when the courts, in this country, are faced with such proceedings as these [i.e. proceedings for the 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 the bias must be specifically alleged and established. It is my view that where any such allegation is made, the Court must carefully scrutinize the affidavits on either side, remembering that when some litigants lose their cases before a Court or quasi-judicial tribunal, they are unable or unwilling to see the correctness of the verdict and are apt to attribute that verdict to a bias in the mind of the judge, magistrate or tribunal.”

It is thus my responsibility to scrutinize the allegations of bias made, with a view to ascertaining whether it is likely to produce in the minds of the public at large, a reasonable doubt as to fairness of the administration of justice.

In carrying out that duty, the court needs to bear in mind the following words of Sachdeva J. in **KARANJA Vs REPUBLIC, MISC. CRIMINAL APPLICATION NO. 199 of 1976;**

“I am well aware of the maxim that justice must not only be done but seen to be done. However, this court will not make such an order on flimsy grounds, at the whim or fancy of an accused person. Justice is administered by persons who had their ample share of human weaknesses and frailties.....”

It is for that reason that I did set out at length, the record of the proceedings herein. By so doing, and by giving my considered views of the various points canvassed by the 1st Respondent, I was discharging the obligation bestowed upon me, to scrutinize the allegations made.

In **KAPLAN & STRATTON Vs. L.Z. ENGINEERING CONSTRUCTION LIMITED & 2 OTHERS, [2000] KLR 364**, at page 370, Lakha J.A. held as follows;

“To sum up, the present state of the law in relation to apparent bias, as it applied to judges, is that there is automatic disqualification for any judge who has a direct pecuniary or proprietary interest in any of the parties or is otherwise so closely connected with a party that he can truly be said to be a judge in his own cause. Apart from that, if an allegation of apparent bias is made, it is for the court to determine whether there is a real danger of bias in the sense that the judge might have unfairly regarded with favour or disfavor the case of a party under consideration by him or, in other words, he might be predisposed or prejudiced against one party’s case for reasons unconnected with the merits of the issue.”

Lakha J.A. went on to note that when the court was carrying out its function of weighing the allegations of bias, it must nonetheless bear in mind the following considerations, as set out by Mason J. in **RE: JRL Exparte CJL (1986) 161 CLR 342**, at page 352;

“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.”

Having applied the test set out in the various authorities cited above, I find that the 1st Respondent has failed to demonstrate that he has a reasonable apprehension of bias. He has failed to demonstrate that a reasonable and fair-minded person, who knew all the facts of the election petition before, me and of how I have handled the matter so far, would reasonably and honestly hold the view that I lack objectivity in the manner that I am presiding over the case. It would be a strange way of demonstrating my bias in favour of the petitioner by ordering him to pay the costs on the Preliminary Objection filed by Mr. Muiruri, as I did.

The 1st Respondent concluded his submissions by reiterating that he has an unshakeable belief in the competence and integrity of this court.

I believe that if the 1st Respondent honestly believed that I was biased or that my ruling bore twisted reasoning, or that the rulings I had given were either contradictory or inconsistent, he could not still be holding an unshakeable belief in my competence and integrity. A judge who is biased or who gives inconsistent or contradictory rulings cannot inspire confidence in his integrity or competence.

I thank the 1st Respondent for his unshakeable belief in me, and I assure him and all the parties in the case before me, that I will continue to discharge the functions of my role as the Election Court, in an impartial, transparent and fair manner. I shall be guided by nothing but the evidence adduced before me and the applicable law.

In the event, and for the reasons given, I find no merit in the application dated 11th January 2011. The application is dismissed with costs to the petitioner, the 2nd and 3rd Respondents.

Dated, Signed and Delivered at Nairobi this 14th day of January, 2011

.....

FRED A. OCHIENG

JUDGE