Application for court to disqualify itself; whether application bad in law because it is made orally; criteria to be considered in deciding it; whether the test of bias is subjective or objective;

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

DIVORCE CAUSE NO. 154 OF 2008

R P M.....PETITIONER

VERSUS

P K M.....RESPONDENT

RULING

On 27.10.2011 when the applications filed in this cause came up for hearing, **Mr. E. Ondieki**, learned counsel for the Respondent, told the court that he wished to make an oral application in camera and requested that the public and the press be required to leave the court room. The court obliged and Mr. Ondieki made an oral application in camera (i.e. in the absence of members of the public and the press). Mr. Ondieki urged me to disqualify myself in this cause because his client, the Respondent, who is the son of the former President Daniel Arap Moi fears that the court might not be fair to him firstly because I had "disagreements with former President Moi **"on issues of governance and policy"** and secondly because I was "imprisoned for contempt of court when I raised fair comment" on a matter which Mr. Ondieki told the court related to the former President Moi. Mr. Ondieki submitted that the Respondent does not know if I ever forgave former President Moi. The Respondent, emphasized Mr. Ondieki, has confidence in the court but he is afraid because he does not know if I ever forgave his father and that he thinks this may have a bearing on the issue of fairness.

Mrs. Thongori, learned counsel for the Petitioner, opposed the application by Mr. Ondieki, and termed it an attempt to intimidate the court. She submitted that it appeared to be a trend on the part of the Respondent to stifle hearing of proceedings. It was Mrs. Thongori's submission that the application had no merit and that in any case, should have been made in writing. It was her further submission in opposition to the application that as the court had heard an application and given a ruling without any objection by the Respondent, the application for a disqualification was not in good faith. In any case, said Mrs. Thongori, the Respondent's father was not a party to the proceedings. She pointed out that the matrimonial matter between the Petitioner and the Respondent did not involve the respective families of the parties. It was contended by Mrs. Thongori that the application that the Judge should disqualify himself was designed to procrastinate the proceedings while the Respondent went "forum shopping."

In reply to Mrs Thongori, Mr. Ondieki pointed out that the application was made in good faith and that he had been instructed to make it. In his own words, "the court has impeccable credentials and integrity and the application was not meant to intimidate the court." Mr. Ondieki referred to Articles 25 and 26 of the Constitution. Article 26 which deals with the right to life may not be relevant but Article 25 does provide that the right to a fair trial cannot be limited in any way by any law. It was Mr. Ondieki's submission that there is judicial practice which accepts the view that where a party fears that he may not have a fair trial,

the court should disqualify itself. Mr. Ondieki also submitted that there was no impunity in making the application and that he had tried to disabuse his client of the fears he had but that his client had insisted on making the application. On his part, Mr. Ondieki expressed confidence in the court but pointed out that his client was apprehensive as he feared that the court may not have forgiven his father. I reserved the ruling for delivery today, 3rd November 2011.

This matrimonial cause was placed in the daily cause list before me on 7.10.2011 when I heard the parties through their respective counsel. Again on 18.10.2011, I heard further arguments from both advocates on behalf of their clients. On 24.10.2011, I delivered a ruling which enhanced the money payable by the Respondent from Shs.60,000/= to Shs.250,000/=. Prior to the ruling, there was not a whimper from the Respondent that I may not be fair to him.

The allegations made from the Bar on behalf of the Respondent are that I had disagreements with the former President Daniel Moi regarding governance and policy issues. Mr. Ondieki did not amplify this allegation. The other allegation is that I was imprisoned by President Moi following a fair comment I made which gave rise to contempt proceedings. It was submitted by Mr. Ondieki that I may not have forgiven former President Moi and implicitly that I might vent my bitterness on the Respondent who is the son of the former President Moi. For starters, it is not true that I was ever imprisoned as alleged.

It is in the history of this country that I was an active member of the Law Society of Kenya in the decades of 1980s and 1990s and that I served the Law Society of Kenya (LSK) as Chairman for two terms during which I and my colleagues in the LSK Council and at the Bar tried to build the LSK into an institution capable of playing a pivotal role in social economic and political life of our country and thus ensuring that the LSK's mandate extended beyond bread and butter issues of its members and encompassed social, economic, democratic and political issues in addition to the Rule of law and human rights. President Moi was then the President of Kenya, then a one party State. The government saw the Law Society of Kenya as a thorn in the flesh and often criticized its officials including me as its Chairman at the time. I however harbour no ill-will against former President Moi. The Respondent had nothing to do with this. I carry no baggage in terms of bitterness. My disagreements with former President Moi were not of a personal nature. I was heading an institution on whose behalf I spoke. The allegation that I am bitter because I was imprisoned by the former President Moi is misplaced and untrue. I was never jailed by President Moi for speaking publicly. Mr. Ondieki and his client perhaps meant to allude to the contempt proceedings filed against me and my client, Honorable Kenneth Matiba and journalists David Makali, and Bedan Mbugua after I criticized the Court of Appeal for kowtowing to President Moi who had attempted to interfere with administration of justice. I had stated in Society Magazine in the issue of March 14, 1994 as follows:

"When the President at Kerugoya on 25/2/94 declared that the University dons shall not be allowed to register a Union at a time when the matter was pending in the Court of Appeal for determination, Kenyans saw interference with the functioning of the Judiciary. The President should have been censured. The subsequent decision by the Court of Appeal on 1/3/94 refusing to grant stay to the University dons may have seemed to many to be judicial lynching and blackmail tailored to meet the political expediency of the Executive."

The former weak-kneed Attorney General Amos Wako filed in the Court of Appeal contempt proceedings against me and my client Kenneth Matiba and journalists David Makali and Bedan Mbugua for allegedly scandalizing the court. The Court of Appeal was then a court of final resort. The Court of Appeal eventually fined me and Hon. Matiba Shs.500,000/= each and Shs.300,000/= and Shs.400,000/= against Makali and Mbugua respectively.

I have gone into these details to show that the allegation made by Mr. Ondieki on behalf of the Respondent is misplaced. The battle was between the Court of Appeal and I and not between former President Moi and I.

Three things stand out in our Constitution with regard to trials. These are, (1) the right of every person to a fair hearing (2) the right for Justice not be delayed (3) the right for Justice to be administered without

undue regard to procedural technicalities and (4) the fact that the national values enshrined in Article 10(1) of the Constitution bind every public officer including a Judge when applying or interpreting the Constitution or any law. These national values include the rule of law, equity, and social justice. I have also not lost sight of the fact that JUDICIAL SERVICE CODE OF CONDUCT AND ETHICS enjoins every judicial officer to ensure compliance with its Rules. The pertinent Rule is Rule 5 which provides:

RULE 5

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.

This is a matter of public interest. 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 . Sight must never be lost of the fact that the Judicial authority is derived from the people and courts are guided by the principle, inter alia, that justice shall be done to all irrespective of status (Article 159 of the Constitution) and every person has the right to have any dispute in a fair hearing. As can be seen, Justice is the fundamental imperative under our Constitution and Judges are the vehicles for adapting law to justice. It is not lost on me that an independent and honourable judiciary is indispensable to justice in our society and that every judicial officer is enjoined to observe and participate in maintaining and enforcing high standards of conduct so that the integrity and independence of the judiciary may be preserved. I am alive to the need for a judge to disqualify himself in proceedings in which his impartiality might reasonably be questioned including but not limited to instances where he has a personal bias or prejudice concerning a party. It is axiomatic that Judges are enjoined to ensure that they do not only act fairly but that fairness must be apparent. That is why they cannot be partial and still hear a matter. Where a judge senses that he may be biased, he must disqualify himself. The Constitution enjoins Judges to exercise their judicial powers to do justice for the good of society always keeping in mind that judicial power is vested in them by the people on whose behalf and for whose benefit they must exercise it. They are required to act valiantly in preserving and using that judicial power to do justice and to maintain truth. They must do that which good conscience dictates to be right upon application of the law regardless of criticisms. But they would be naive not to expect criticisms. After all, there will always be winners and losers who will be disgruntled in litigation. But they must take criticism positively. Where the criticism is justified, they must mend; where it is not, they must take it in their stride. But they must not be discouraged or be deterred in their quest to do justice. It was Lord Atkin who stated as long ago as 1936 in **AMBARD v. ATTORNEY GENERAL FOR TRINIDAD AND TOBAGO (1936) AC 322** at pg.35 that **“justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.”**

The task of doing justice reposes on all officers of the court. An Advocate must be faithful to his calling. He must counsel and guide his clients properly. He is a legal expert. He is hired on account of that. He is not a mouth piece of his client. He is also an officer of the court. As an officer of the court, he is enjoined to help in the pursuit of justice. He will therefore not mislead the court or act in any manner that subverts justice. It was Crampton J who in memorable words once laid down the forensic duty of the advocate. Said he:

"This court in which we sit is a temple of justice; and the advocate at the Bar, as well as the Judge upon the Bench are equally ministers in that temple. The object of all equally should be the attainment of the truth; but we are all judges, ... advocates and attorneys together concerned in search for the truth; the pursuit is a noble one, and those are honoured who are the instruments engaged in it ..... the infirmity of human nature, and the strength of human passion may lead us to take false views, and sometimes to embarrass and retard rather than to assist in attaining the great object; the temperament, the imagination and the feelings may all mislead us in the chase—but let us never forget our higher vocation as ministers of justice and interpreters of the law; let us never forget that the advancement of justice and the ascertainment of truth are higher objects and nobler results than any which in this place we can propose to ourselves. Let us never forget the Christian maxim "that we should not do evil that good may come of it."

Great words these!

The public and the press were required to move out of the courtroom at the behest of Mr. Ondieki on 27.10.2011. Yet he briefed them after the court session. That is what Standard daily reported the following day on 28.10.2011. What a charade! In retrospect, there was nothing in the application that warranted shielding from the public or the press. But knowing that they were kept out, the press would have done well to avoid tempting breach of the law.

It is quite clear that there is no proper basis for the alleged fear on the part of the Respondent that the court may not be fair. The allegations made are not true and do not show that there exists anything that might militate against fairness. I am aware of the maxim that justice must not only be done, but that it must also be seen to be done. All Judges, like Ceasar's wife, should be above suspicion. But it would be chaotic if any allegation of bias, whether buttressed with sufficient grounds or whether baseless, were to be said to be sufficient to disqualify a Judge from hearing a matter. If that were the case, all that a mischievous litigant would need to do to stall or stifle hearing of court proceedings would be to make allegations however flippant and without basis against the Judicial Officer presiding. Jurisprudence on this aspect of the law shows that a judge should disqualify himself/herself if he has an interest in a matter or if he is not capable of dispensing justice to the parties either on account of bias or other reasons that may militateagainst fairness. I recognise the dire need to ensure that at the end of the day court decisions must be meted out dispassionately and in a manner that has integrity. They must conform to the law and do justice to the parties.

I have given anxious consideration to the allegation by Mr. Ondieki that his client has fear that I might not be fair to him on account of my alleged erstwhile relationship with his father. I know in my own conscience that I habour no ill-will against the former President Moi and if he needed to be forgiven, I would have forgiven him a long time ago. The fact that the allegation was made after two court appearances before me and after the ruling delivered on 24.10.2011 makes the allegation appear as an afterthought. The Respondent has nothing to fear in this Judge. My duty from which I shall not waiver is to do justice to all those whose cases come to me. I do know that pursuit of justice is a basic and primordial instinct in every person. I realize that the confidence of any people in their system of justice also depends on the extent to which they have freedom to express themselves. That is why an application to a judicial officer to disqualify himself is not misplaced because it is orally made. It need not be in writing.

I am not a timorous soul afraid of making decisions. As long as I know that I have understood the evidence and the facts thrown up by the evidence and that I have applied the law correctly, my conscience is free. The Respondent has nothing to fear in this case. The court shall be fair to all the parties.

As the Respondent has not shown sufficient grounds to establish bias, I dismiss the application in the knowledge that justice shall not only be done, but shall also manifestly be seen to be done. If I had the littliest inkling that I might be prejudiced, I would decline to hear the case. I don't

Dated at Milimani Law Courts, Nairobi, this *3rd* day of *November* 2011.

G.B.M. KARIUKI, SC

JUDGE

COUNSEL APPEARING

Mrs. J. Thongori, Advocate for the Applicant

Mr. E. Ondieki, Advocate for the Respondent

Mr. D. Mutisya, Court Clerk