REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT 172 OF 2009

JOSEPH KAMAU MUCHINA…....……....PLAINTIFF/APPLICANT

VERSUS

JOYCE AKINYI ACHIENG…….……DEFENDANT/RESPONDENT

RULING

This cause alongside **H.C.C.C. NO. 291 of 2009**, ***Susan Akoth Ochieng & Another*** vs. ***Anthony Chinedu Ifedegbo & Another*** were listed before me on the 25th of June, 2009 and appearing on the daily cause list as No.5 and 7 respectively.

When this matter was called out the counsels representing the parties herein walked in, alongside them were two other counsels. Upon inquiry the court was informed that the said counsels acted for the 1st Defendant in H.C.C.C. No. 291 of 2009, referred to herein above. The two counsels were ***Mr. Havi*** & ***Mr. Osundma*** Mr. ***Njagi*** appears for the 2nd Defendant in that matter while ***Mr. A. T. Oluoch*** appears for the Plaintiff. Of significance to this case, is the fact that ***Mr. Njagi*** informed the court that this cause and H.C.C.C. NO. 291 of 2009 were informally consolidated on the 4th June, 2009, hence the reason why both matters were listed to be heard together today. However, a look at the proceedings of the 4th of June 2009, in H.C.C.C. NO. 291 0f 2009, no such order was given save for the court's observation of the need to have counsel address it on whether the matters ought to be consolidated.

On his part ***Mr. A. T. Oluoch*** informed the court that, on the 22nd June, 2009, his firm filed a notice of withdrawal in H.C.C.C. No. 291 0f 2009. On their part counsels for the 1st defendant, and the 2nd defendants in that cause had no objection to the withdrawal but asked for costs. The court made orders accordingly. Having dispensed with the said matter the court inquired from ***Mr. Njagi*** for the Applicant/Plaintiff in this cause whether he would proceed with his pending application. At which point ***Mr. Njagi*** informed the court, that he had instructions to apply to have the court disqualify itself, as the Judge is a close friend of one ***Dr. P. L.O. Lumumba*** Advocate of ***Lumumba & Lumumba*** Advocates, and had worked with said ***Dr. P.L.O Lumumba*** at the ***Constitution of Kenya Review Commission.*** That there is likelihood of bias and that the court appears to have changed attitude since the respondent changed to the said firm of ***Lumumba & Lumumba*** Advocates.

Mr. A. T. Oluoch for the respondent opposed the application for disqualification arguing that the Judge had indeed served with many other lawyers as colleagues at the bar. That this is not a good ground for disqualification.

Mr. Njagi in his reply, asked to file a formal application and time to look up authorities in support of his

application. The court declined to give more time as ***Mr. Njagi*** had already made oral representation, for the courts consideration, for purposes of the application for disqualification.

The following are a summary of the facts surrounding this matter: –

(a) That ***Mr. P. L. O. Lumumba of Lumumba and Lumumba Advocates*** *was* a colleague at *the bar.* Which is indeed common knowledge.

(b)That while I served as a Vice Chair and subsequently as Chairperson of the Constitution of Kenya Review Commission, ***Dr. P. L. O. Lumumba*** served as the Secretary to the said Commission.

(a) That the matter was first listed before me on the 11th May, 2009 where *Mr. P. Mutuli* advocate appeared for the Defendant/Respondent.

(b)On the 13th of May, 2009 Mr. A. T. Oluoch advocate appeared for the Defendant/respondent there having been a change of advocates.

(c) On the 19th May, 2009 the matter was listed before me. Both *Mr. Njagi* advocate *& Mr. A. T. Oluoch* advocate represented their respective clients.

(d) On the 20th of May, 2009 both *Mr. Njagi* & *Mr. A.T Olouch* appeared before me again, where Mr. Njagi argued his application for contempt.

(e) On the 25th of May, 2009 only *Mr. Njagi* appeared. On that day the court delivered its ruling on the application for contempt.

(f) The appearance before me by the parties herein on the 25th, June 2009 was the 6th time the matter had been listed before me. 5 of which *Mr. A. T. Oluoch* of *Lumumba & Lumumba Advocates* had appeared for the Respondent/defendant.

(g) That during the 5 appearances no objection was raised nor was I asked to disqualify myself.

3. From the very first appearance, ***Mr. Njagi*** advocate informed the court that the Respondent/Applicant was in contempt of the interim court orders. This was submitted repeatedly and on the 19th of May, 2009 the court suggested that the counsel for the Applicant/Plaintiff could move the court for contempt.

(4) On the same day the 19th of May 2009, the Applicant/Plaintiff preferred contempt proceedings under the provisions of order 39 Rule 2A (2) & 9 of the Civil Procedure Rules.

(5) The court gave a ruling on the 25th of May, 2009, declining to give the orders, as upon close scrutiny, the Applicant/Plaintiff had not complied with the necessary procedures; namely service of the order complained of, and Penal Notice upon the Respondent/Defendant personally.

Having declined as stated in 5 above the court ordered that the main application for an injunction be heard inter-parte.

I am shocked & perturbed by ***Mr. Njagi***'s assertions. ***Mr. Njagi*** appeared before me severally, had no objection to me presiding over this matter. He had no quarrel with the various comments and/or observation the court made towards the Respondent/Defendant, each time he submitted that the Respondent/Defendant was in contempt, but ***Mr. Njagi*** now has issues, upon the court declining to give orders against the Respondent/Defendant.

That as it may, I will now proceed to consider the oral application, for my disqualification on its merit. The courts in this country have set principles to be applied in situations where a judge may disqualify

himself, namely –

1. Where there is reasonable ground for assuming the real possibility of a bias.

2. Where in the mind of the public at large there is reasonable doubt about the fair administration of justice.

3. Where there is pecuniary interest.

4. The test for the above is objectivity, and facts constituting bias must be established.

Lord Denning set out the principles in **METROPOLITAN *PROPERTIES CO. (FGC) LTDVS LANNON & OTHERS* (**1969) 1Q.B 577 he stated: -

"**A man may be disqualified from sitting in a judicial capacity on one of these grounds direct pecunary interest in the subject matter. Secondly, bias in favour of one side as against the other. In considering whether there was a real likelihood o bias, the court does not look at the mind of the justice himself …. The court looks at the impression which would be given to other people…"**

Having set out the principles to be considered, I will now turn to the grounds cited by the Applicant/Plaintiffs counsel for my disqualification;-

A. The first ground is that ***Dr. P.L.O Lumumba*** is alleged to be a 'close friend'. No facts were laid to show that we are '***close friend***'. Being a colleague one may consider him a friend. It is common knowledge that we were colleagues at the bar, as I was with thousands of other Advocates before I was raised to the bench recently. The courts have found that even where judge is known to a litigant he need not disqualify himself.

In the case of ***MILLER VERSUS MILLER*** (1988) e KLR 1 it was held by ***Nyarangi, Gachuhi & Masime*** JJA that:-

"**1. The allegation of friendship between the Respondent and the judge was bare that no reasonable court would be expected to act on it. The mere fact that the judge knew the Respondent would not justify disqualification. There were no circumstances explained pointing to a real likelihood of bias or appearance of bias.**

2. The trial judge had no interest of any nature in the case and he as right in refusing to disqualify himself."

It is also common Knowledge that Dr. P.L.O. Lumumba & I served in the Constitution of Kenya Review Commission, I as Vice Chair, eventually Chairperson & Him as the Secretary. Does this in itself give an impression of bias on fair thinking members of the public? I think not. In a comparable situation in ***REPUBLIC VERSUS HON. JACKSON MWALULU & OTHERS* (2005) e KLR** Omolo, Tunoi JJA & Deverell Ag JA, held inter alia,

"**We think it would be a dangerous proposition of law that irrespective of the nature of the dispute involved, a judge who was previously a partner in a law firm, must not sit on any matter in which his previous firm is involved, it must depend on the circumstances of each case. If the matter, for example , a commercial dispute between two parties and involving large sums of money, then in such a situation, it might well be improper for the judge to sit on the matter, as it can be taken that such a situation the partners in the law firm might discuss the same issue amongst themselves so as to prevent their client suffering a large financial loss. The Commission of Inquiry into the *Goldenberg affair,* just like any other commission created under the *Commissions of Inquiry Act,* is not a dispute involving any parties the name inquiry implies it is an inquiry ……. Once again, we do not think that there is absolutely any reason or basis for thinking that *Deverell Ag, JA* will be biased merely because he was in the same law firm with Mr. Ojiambo who represented Mr.**

Mudavadi in the proceedings before the Commission of Inquiry

In ***R VS GOUGH (1993)*** 2 ALL ER 724 the House of Lords held:-

" **Except where a person acting in a judicial capacity had a direct pecuniary interest in the outcome of the proceedings when the Court would assume bias and automatically disqualify him from adjudicating, the test applied in all cases of apparent bias…..was whether, having regard to the relevant circumstances there was a real danger of bias on the relevant member of the tribunal in question, in the sense that he might unfairly regard with favour or disfavour the case of a party to the same issue under consideration by him"**

Lord Golf summarized the matter as

" …..**for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias"**

Borrowing from the above 2 authorities and drawing inferences from them, at the Constitution Of Kenya Review Commission neither ***Dr. P.L.O Lumumba*** nor I were engaged in a matter that adversely affected the Applicant/ Plaintiff. Nor can the mere fact that I served in the commission with the said advocate be a reason or basis of bias on my part. Having practiced law in Kenya for the last 23 years, it is obvious that I have in the course of business come into contact with hundreds if not thousands of advocates, will I disqualify myself when they appear before me on account of knowing them or having worked with them? Of course not, I have to be objective and apply the set principles in arriving at such a decision for disqualification.

B. The second ground by the counsel was that since the law firm of ***LUMUMBA & LUMUMBA ADVOCATES*** came on record the attitude of the court has changed. As observed earlier the said law firm came on record on the 12th of May, 2009. The parties have since appeared before me 5 times. at what point did the court's attitude change? Did the attitude change because the Applicant/Plaintiff's application for contempt was denied? It is clear to the court that after losing the application for failure to comply with mandatory procedures the Applicant/Plaintiff blames the court. To my mind there is absolutely no basis for this assertion. The Plaintiff/Applicant in failing to get his orders, refuses to see and/or admit the correctness of the court's verdict.

In ***REPUBLIC VS MAKALI & 3 OTHERS, CRIMINAL CASE NOS 4 & 5 OF 1994*** Tunoi JA held:-

"**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 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 bias must be specifically…alleged and established. It is my view that where any such allegations is made, the court must carefully scrutinize the affidavits on either side, remembering that when some litigants lose their cases before a court or a 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"**

In ***UHURU HIGHWAY DEVELOPMENT LIMITED VS CENTRAL BANK OF KENYA & 2 OTHERS*** Civil Appeal No. 36 of 1996 in declining to disqualify themselves Akiwumi, Tunoi & Shah JJA observed:-

"**in the circumstances, we have carefully considered the application to disqualify ourselves and the evidence preferred in support of it…..We are confident that the application and the circumstances surrounding it do not in the least show that there is real or even probable danger or bias on our part in the hearing of the present appeal. If we felt so, we would each have disqualified ourselves**

without being asked to do so. We have also borne in mind the following in *Raybos Austalian Property Ltd* & *Another V Tectran Corporation Property Ltd.* NSW LR 272 which was referred to with approval of this court (see the judgement of Tunoi JA) in *Republic V David Makali, Bedan Mbugua, Independent Media Services* And *George Benedict M Kariuki Criminal application Nos 4 & 5 of 1994* (unreported)

" **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."**

I have in many words, shown that this court has no reason to be biased, nor does the court have any interest whatsoever in the matter. I have also shown that there is no real possibility or probability of the public at large having doubt in this court administering justice. Considering by the circumstances of this case, and guided by the authorities cited above, I am convinced that there is no basis whatsoever, factual or legal upon which this court should disqualify itself from hearing this matter. I therefore decline to disqualify myself from presiding over this matter, and order that the pending application filed by the Applicant/Plaintiff on the 1st of April, 2009 under certificate of urgency proceed for inter-parte hearing before this court.

Dated and delivered this 26th day of June, 2009.

ALI- ARONI

JUDGE