In re Estate of the Late Christine Mutio Musembi (Deceased) (Family Appeal 89 of 2022) [2024] KEHC 2294 (KLR) (5 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2294 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

FAMILY APPEAL 89 OF 2022

SM GITHINJI, J

MARCH 5, 2024

IN THE ESTATE OF THE LATE CHRISTINE MUTIO MUSEMBI (DECEASED)

BETWEEN

FLORENCE NICOLE NJENGA .... 1ST APPELLANT

KENNETH MUSEMBI .... 2ND APPELLANT

AND

JULIUS CHILUMO LULU .... RESPONDENT

AND

ISMAEL MAHATI .... INTENDED THIRD PARTY

(Being an Appeal from the Judgment/Order of Honourable J.Ong'ondo – SRM in Succession Cause No. E001 of 2022 in Malindi Chief Magistrate Court delivered on the 11th October, 2022)

RULING

1. For determination is the Respondent's notice of motion application dated 9th August 2023, brought under section 1A, 1B and 3A of the *Civil Procedure Act*, Order 22 rule 22 and Order 51 of the *Civil Procedure Rules*. Respondent seeks orders: -

    a. Spent.

    b. Spent.

    c. That there be an order for stay of the proceedings including writing and/or delivery of any ruling or judgment in relation to this subject suit pending the hearing and determination of the intended appeal in the Court of Appeal.

d. That the Honourable Judge Justice S M Githinji may be pleased to recuse and/or disqualify himself from any further conduct of this matter.

e. That costs of this application be provided for.

2. The application is based on the grounds outlined on its face and the supporting affidavit sworn by the Respondent on 9th August 2023. The Respondent deposed that following the Appellant's application dated 14th June 2023, *ex-parte* injunction orders were issued on 15th June 2023 to be in force until 20th September 2023. This then prompted him to file an application under certificate of urgency dated 20th June 2023, to set aside/vary the said *ex-parte* orders. The Respondent's application was fixed for hearing on 20th July 2023 when the Respondent's advocates, Ms. Angeline Omollo & Associates, attended court.

3. According to the Respondent, his advocate was kept waiting up until late in the evening of the same date when I directed that the application will be mentioned on 18th September 2023 to confirm filing of submissions and for ruling. The Respondent stated that his counsel's request to be heard and for three days to file submissions was declined. To him that was a clear indication of bias. The Respondent is apprehensive that if I proceed to preside over this case, he will not be accorded a fair trial.

4. The Respondent added that he has filed a notice of appeal against the directions issued on 20th July 2023.

5. The Appellants opposed the application. They filed a Replying Affidavit on 11th September 2023, sworn by Florence Nicole Njenga who deposed that the injunction orders that were issued on 15th June 2023 were aimed at preserving the estate of the deceased since the Respondent had started disposing the estate despite there being a pending application for stay of execution. She stated that the Respondent should have responded to the application dated 14th June 2023 for substantive hearing instead of filing counter applications. To her, this was not procedural.

6. The application was canvassed by way of written submissions.

The Respondent's Submissions

7. In the submissions filed on 6th November 2023, counsel for the Respondent argued that the *ex-parte* injunction orders were unlawful for contravening Order 40 Rule 4 (2) of the *Civil Procedure Rules* which enshrines that an *ex-parte* injunction may only be granted for a period not exceeding 14 days. Counsel relied on the Respondent's supporting affidavit. She submitted that having demonstrated therein that the Respondent has on several occasions been denied justice, the prayer for recusal should thus be allowed. Counsel relied on the case of *Kipsongok Tenai v Republic* [2014] eKLR.

The Appellants' Submissions

8. Counsel for the Appellants filed submissions on 17th November 2023 wherein he reiterated the matters highlighted in the Appellant's replying affidavit. Counsel argued that the Respondent's contention that he was not given an opportunity to be heard on 20th July 2023 was not true. To counsel, the Respondent had not established any compelling reason for recusal or stay of proceedings. On the rules and grounds for recusal, counsel relied on the case of *Rachuonyo & Rachuonyo Co. Advocates v National Bank of Kenya Ltd* [2021] eKLR.

9. Having considered the application, affidavits and annexures thereto, submissions and authorities cited by the parties, I am of the view that the two issues for determination are: -

i. Whether the application for recusal meets the Legal threshold required for a judge to recuse himself.

ii. Whether proceedings in this suit should be stayed pending hearing and determination of the appeal before the court of appeal.

Analysis and Determination

Issue i - Whether the Application for Recusal Meets the Legal Threshold Required for a Judge to Recuse Himself.

10. In order to determine this issue, it is prudent that I reproduce from the court record, what transpired from the time the first application was filed in this appeal. The Appellants preferred this appeal against a ruling delivered by Hon. J. Ong'ondo on 11th October 2022 where their application for annulment of grant was dismissed. They filed a notice of motion application dated 21st October 2022 seeking *inter alia* conservatory orders in respect of the said ruling and stay of execution. That application was filed on 25th October 2022. On 26th October 2022, the court certified the same urgent and directed that the same be served. The Respondent, through his advocates entered appearance on 23rd November 2023 and filed a replying affidavit on 14th December 2022. In fact, when the same was mentioned for directions on 5th December 2022, the Respondent's advocate sought 21 days to file the aforementioned response; the court allowed that request. The application was mentioned on 9th March 2023 when the court directed that the same be canvassed by way of written submissions, and gave a mention date for 14th June 2023.

11. Before the said date, the Appellants filed another application dated 8th June 2023 under a certificate of urgency. It came up on 9th June 2023 when the court directed that the same be served upon the Respondent and mentioned on 14th June 2023 for further directions. On 14th June 2023, the court did not sit, and the matters were adjourned to 20th September 2023 in the registry. It happens that on the same date, the Appellants filed another application under certificate of urgency, dated 14th June 2023. This application was mentioned on 15th June 2023 when the court certified the same urgent. The court also granted interim orders of temporary injunction and directed that the same is served upon the Respondent and the intended third party. The court directed that the application also be mentioned for directions on 20th September 2023.

12. On 26th June 2023, the Respondent filed a notice of motion evenly dated seeking to set aside the temporary injunction orders issued *ex-parte* on 15th June 2023. That application was mentioned on 27th June 2023 when the court directed that the same be served upon the Appellants. The court directed the registry to fix the matter for a close date for mention due to the urgency. The court further directed that the application be mentioned on 20th July 2023 for directions.

13. On the said 20th July 2023, both parties presented themselves before me and requested to prosecute the Respondent's application orally. I agreed to hear them after mentioning the other matters scheduled for that day. However, due to the long cause list of matters slated on that date, which I completed at 4.00pm, I was unable take oral submissions. I subsequently issued directions that parties do file written submission.

14. It is the events of 20th July 2023 that provoked the Respondent to institute the present application.

15. Having extensively reproduced the facts and the issues preceding the application for recusal I will now determine whether the application for recusal meets the threshold for a judge to recuse himself.

16. Judicial recusal is underpinned by constitutional, statutory and common law principles and the rule against bias and the notion that justice must not only be done but seen to be done from the common law principal for recusal. Under Article 160 of the *Constitution* of Kenya 2010, the courts are enjoined to exercise and exhibit independence and are not subject to the control and directions of any person or authority.

17. In the case of *Rachuonyo and Rachuonyo Advocates v National Bank of Kenya Limited* [*supra*] cited to me by the Appellant, the court highlighted the principles as follows: -

> " 24. The principles in the cases I have cited buttress the standards of conduct enacted in the *Judicial Service (Code of Conduct and Ethics) Regulations 2020* dated 26th May 2020. Under Regulation 21 Part II of the said *Code of Conduct*, a Judge can recuse himself or herself in any of the proceedings in which his or her impartiality might reasonably be questioned where the Judge;
>
> a. Is a party to the proceedings;
>
> b. Was, or is a material witness in the matter in controversy;
>
> c. Has personal knowledge of disputed evidentiary facts concerning the proceedings;
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> d. Has actual bias or prejudice concerning a party;
>
> e. Has a personal interest or is in a relationship with a person who has a personal interest in the outcome of the matter;
>
> f. Had previously acted as a counsel for a party in the same matter;
>
> g. Is precluded from hearing the matter on account of any other sufficient reason; or
>
> h. Or a member of the Judge's family has economic or other interest in the outcome of the matter in question."

18. In the instant application the only allegation raised by the Respondent is that there exists bias on my part. In considering whether a judicial officer exhibits bias the courts have developed an objective test. The Supreme Court in *Gladys Boss Shollei v Judicial Service Commission & another* [2018] eKLR explained: -

> " ...every judge has a duty to sit, in a matter which he duly should sit. So that recusal should not be used to cripple a judge from sitting to hear a matter. This duty to sit is buttressed by the fact that every judge takes an oath of office: "to serve impartially; and to protect, administer and defend the *Constitution*." It is a doctrine that recognizes that having taken the oath of office, a judge is capable of rising above any prejudices, save for those rare cases when he has to recuse himself. The doctrine also safeguards the parties' right to have their cases heard and determined before a court of law.
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> (26) In respect of this doctrine of a judge's duty to sit, Justice Rolston F. Nelson; of the Caribbean Court of Justice in his treatise – "*Judicial Continuing Education*

Workshop: Recusal, Contempt of Court and Judicial Ethics; May 4, 2012; observed:

> "A judge who has to decide an issue of self-recusal has to do a balancing exercise. On the one hand, the judge must consider that self-recusal aims at maintaining the appearance of impartiality and instilling public confidence in the administration of justice. On the other hand, a judge has a duty to sit in the cases assigned to him or her and may only refuse to hear a case for an extremely good reason" (emphasis mine)

(27) In the case of *Simonson –vs- General Motors Corporation* USDC p.425 R. Supp, 574, 578 (1978), the United States District Court, Eastern District of Pennsylvania, had this to say: -

> "Recusal and reassignment is not a matter to be lightly undertaken by a district judge, While, in proper cases, we have a duty to recuse ourselves, in cases such as the one before us, we have concomitant obligation not to recuse ourselves; absent valid reasons for recusal, there remains what has been termed a "duty to sit" . . ."

(28) It is useful to refer to the case from the New Zealand Court of Appeal *Muir -v- Commissioner of Inland Revenue* [2007] 3 NZLR 495 in which the Court stated as follows: -

> "the requirement of independence and impartiality of a judge is counter balanced by the judge's duty to sit, at least where grounds for disqualification do not exist in fact or in law the duty in itself helps protect judicial independence against maneuvering by parties hoping to improve their chances of having a given matter determined by a particular judge or to gain forensic or strategic advantages through delay or interruption to the proceedings. As Mason J emphasized in *JRL ex CJL* (1986) 161 CLR 342 "it is equally important the judicial officers discharge their duty to sit and do not by acceding too readily to suggestion 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."

19. Further, the court of appeal in *Philip K. Tunoi & another v Judicial Service Commission & another* [2016] eKLR had the following to say on recusal pinned on allegations of bias: -

> "40. The test in *R v. Gough* was subsequently adjusted by the House of Lords in Porter v. Magill [2002] 1 All ER 465 when the House of Lords opined that

the words "a real danger" in the test served no useful purpose and accordingly held that –

> "[The question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

41. In determining the existence or otherwise of bias, the test to be applied is that of a fair-minded and informed observer who will adopt a balanced approach and will neither be complacent nor be unduly sensitive or suspicious in determining whether or not there is a real possibility of bias.

42. In *Taylor v. Lawrence* [2003] QB 528 at page 548, in which an application was made to reopen an appeal on the ground that the Judge was biased, the Judge having instructed the plaintiffs' solicitors many years previously the House of Lords in the judgment of Lord Woolf CJ reiterated:

> " ... we believe the modest adjustment in *R v. Gough* is called for which makes it plain that it is, in effect, no different from the test applied in most of the commonwealth and in Scotland."
>
> The Court must first ascertain all the circumstances which have a bearing on the suggestion that the Judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased."

20. Is bias therefore discernible in this case in the eyes of a reasonable or fair-minded person? The Respondent's reasons for my alleged bias is that I refused to hear his counsel when they appeared before me on 20th July 2023. I have extensively reproduced above what transpired in court on the said date. It is clear that the Respondent's application was coming up for directions when Miss Omollo, counsel for the Respondent expressed willingness to instantly dispose the application orally. Mr. Murigu agreed to proceed and so I informed parties that I would hear them after mentions and hearings scheduled for that date. Unfortunate for them, and for the reasons I gave in court on that date and later on 11th October 2023, I was unable to take more submissions. I informed counsel that the day was far spent and since I had not taken any break from consistent and intensive work since 5.30 a. m up to that time, I was exhausted and not in a position to take oral submissions.

21. Given the circumstances at hand, I am not persuaded that any reasonable or right minded individual or observer would find bias on my part. In any event the application was coming up for directions and not hearing thereof, and the directions I was ultimately forced to issue due to the aforementioned circumstances, were that I would hear the application by way of written submissions as opposed to oral submissions. How this is discriminatory to the Respondent, he has not sufficiently explained.

22. The outcome is that the Respondent's advocate has not made out a case for recusal. I therefore decline to recuse myself in this matter.

Issue ii - Whether Proceedings in this Suit Should be Stayed Pending Hearing and Determination of the Appeal Before the Court of Appeal.

23. There is no doubt that the Respondent has filed a notice of appeal challenging the directions issued on 20th July 2023. As already established, those directions were in relation to his application to set aside

the interim temporary injunction orders issued on 15th June 2023 pending further orders. In that case, it is necessary that the appeal is first determined as it will have a bearing in the Appellants' application herein. For the above reason, I hereby order that there be a stay of proceedings herein pending the outcome of the intended appeal before the Court of Appeal.

24. The upshot is that the application is allowed in terms of prayer C. Parties to bear their own costs. We take a mention date for further directions unless the appeal is already determined.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 5TH DAY OF MARCH, 2024.

....

S.M. GITHINJI

JUDGE

In the presence of; -

Ms Apiyo holding brief for Ms Omollo for the Applicant

Mr Murigu for the Respondent is absent