Mtaani v Judicial Service Commission & another (Petition E160 of 2023)
[2024] KEHC 3487 (KLR) (Constitutional and Human Rights) (12 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3487 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E160 OF 2023

LN MUGAMBI, J

APRIL 12, 2024

BETWEEN

SHERIA MTAANI ..... PETITIONER

AND

JUDICIAL SERVICE COMMISSION ..... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

RULING

Introduction

1. By a Notice of Motion application dated 22nd June 2023 supported by the Petitioner's affidavit sworn on even date, the petitioner/applicant seeks the following orders:

    i. Spent.

    ii. His Lordship Justice Nthiga Lawrence Mugambi be pleased to recuse himself from handling any further proceedings in this matter and the file be placed before the presiding judge for reallocation.

    iii. Costs of the application be in the cause.

Petitioner's Case

2. On behalf of the Petitioner, Dorcas Mwae a Director of the Petitioner deponed that the gist of this petition is the manner in which the 1st respondent conducted interviews for the Judges that were held between 3rd October and 3rd November 2022.

3. She avers that this petition was allocated by the then Presiding Judge, Hon. Lady Justice Ong'udi to be placed before His Lordship Justice Mugambi on 12th June 2023. She deposes on the said 12/6/2023, the petitioner promptly applied for His Lordship to recuse himself from the matter.

4. According to the petitioner, the application for recusal is founded on the ground that His Lordship is one of the Judges that was selected during the impugned interview process by the 1st respondent.

5. The petitioner for this reason is apprehensive that there is a real possibility of bias on the part of His Lordship Justice Lawrence Mugambi in determining this suit. The petitioner thus urged His Lordship to recuse himself from the matter in the interest of justice.

1st Respondent's Case

6. In response, the 1st respondent opposed the application for recusal in its grounds of opposition dated 29th June 2023 on the basis that:

    i. The application has no merit, is a waste of judicial time and resources and is an abuse of the Court process.

    ii. The applicant has not established any valid grounds upon which it seeks recusal of the honourable judge thus the application does not meet the threshold for recusal of a judge in a matter.

    iii. The fact that the honourable judge was appointed during the impugned period is not an automatic basis for recusal. The judge took oath of office and is committed to his oath which he is ready and willing to honour in dispensing justice in matters falling within his jurisdiction.

    iv. The petition as drawn is wide and casts doubt on the manner in which the 1st respondent has previously conducted interviews of judges and judicial officers. The applicant has in fact cited the 2016 interviews for judges as a case in point of the alleged constitutional violations.

    v. We invite the court to take judicial notice that there are only 5 judges at the Constitutional and judicial review division at Milimani all of whom were appointed post 2016. As such, according to the petitioner even their appointments and those of all judges since the inception of the 1st respondent were conducted without proper guidelines, criteria, and rules for interviews.

    vi. As such, seeking recusal of the honourable judge on this basis is also applicable to all other judges appointed by the 1st respondent. What is good for the goose is also good for the gander.

    vii. The applicant has not demonstrated that justice shall be compromised by the honourable judge-exercising jurisdiction over the matter. If the prayers sought are granted, it will hinder the conduct of litigation and prejudice the respondents who are keen on concluding the matter promptly.

2nd Respondent's Case

7. The 2nd respondent's did not file a response or submissions to the application.

Petitioner's Submissions

8. The petitioner in support of its case, filed submissions dated 25th July 2023. Counsel relying on the *Black's Law Dictionary 8*th Ed. (2004) (P.1303) stated that recusal is defined as 'the removal of oneself as judge or policy maker in a particular matter, [especially] because of a conflict of interest'. Furthermore,

that the test to determine when a judicial officer should recuse himself was cited in the case of *Jan Bonde Nielson vs Herman Philipus Steyn & 2 others* (2014) eKLR as follows:

> " The appropriate test to be applied in determining an application for disqualification of a Judge from presiding over a suit was laid down by the Court of Appeal in R v David Makali And Others C.A Criminal Application No Nai 4 and 5 of 1995 (Unreported), and reinforced in subsequent cases. See R v Jackson Mwalulu & Others C.a. Civil Application No Nai 310 OF 2004 (Unreported) where the Court of Appeal stated that:
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> > "...When courts are faced with such proceedings for 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 bias must be specifically alleged and established..."

9. Essentially, Counsel stressed that, the Court has to address its mind to the question as to whether a reasonable and fair-minded man sitting in Court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible. If the answer is in the affirmative, disqualification will be inevitable as observed by the Supreme Court in *Jasbir Rai and 3 Others v Tarlochan Singh Rai and 4 Others* SCK Petition No. 4 of 2012 (2013)eKLR.

10. Like dependence was placed in *Kaplana H. Rawal vs Judicial Service Commission & 2 others* (2016) eKLR, *R v Gough* [1993] 2 All E.R. 724, *Patrick Ndegwa Warungu v Republic*, Milimani High Court Application No. 440 of 2003 and Perry vs Schwarzenegger, 671 F. 3D 1052 (9th CIRC. February 7, 2012).

11. It is the petitioner's argument therefore that the crux of recusal in cases such as the one before this court is to preserve public confidence in the administration of justice. On this basis, the petitioner stressed that it is understandably apprehensive of the outcome owing to the facts stated. Moreover, that a reasonable observer with the stated facts will also undoubtedly find a possibility of real or reasonably perceived bias or prejudice.

1st Respondent's Submissions

12. On 22nd September 2023, G and R Advocates LLP for the 1st respondent filed submissions where counsel highlighted the issue for discussion as, whether the petitioner has established the threshold to warrant recusal of His Lordship Justice Mugambi.

13. Counsel begun by submitting that Regulation 21 of the *Judicial Service Code of Conduct and Ethics Regulations* 2020 provides for the grounds for recusal of a judicial officer as being: is a party to the proceedings ; was, or is a material witness in the matter in controversy; has personal knowledge of disputed evidentiary facts concerning the proceedings; has actual bias or prejudice concerning a party; has a personal interest or is in a relationship with a person who has a personal interest in the outcome of the matter; has previously acted as counsel for a party in the matter ; is precluded from hearing the matter on account of any other sufficient reason; or a member of the judge's family has economic or other interest in the outcome of the matter in question.

14. In Counsel's opinion, the application herein is solely grounded on the fact that the Honourable Judge was appointed by the 1st respondent. This is said not to be a sufficient reason in line with the test in the cited grounds. Equally, it is argued that this is a handicap that is likely to be suffered by any other

judge that handles the petition as they were also appointed by the impugned body. For this reason, His Lordship Justice Mugambi recusal is deemed to be unmerited.

15. In support of this argument reliance was placed in *Nairobi Water Conservation & Pipeline Corporation v Runji & Partners Consulting Engineers & Planners Limited* (2021)eKLR where it was held that:

> "First, in considering the application for recusal, the court as a starting point presumes that judicial officers are impartial in adjudicating disputes. This in-built aspect entails two further consequences. One, it is the applicant for recusal who bears the onus of rebutting the presumption of judicial impartiality. Two, the presumption is not easily dislodged. It requires "cogent" or "convincing" evidence to be rebutted....An applicant in a recusal application must meet the high threshold of satisfying the "real danger of bias" test namely that there was a real danger that the judge might unfairly regard with favour or disfavour the case of a party to the issue under consideration by him."

16. Analogous and further dependence was also placed in *Edward Mwangi Macharia v Maina & Maina Advocates* [2019] eKLR, *Gikonda vs Bogani Gardens Management Company Limited* [2022]eKLR, *Republic v Kenya Motorsports Federation Ltd & another Ex Parte Rory Hugh Thomas McKean & another suing through parents and next friend* [2021] eKLR, and *Kaplana H. Rawal v Judicial Service Commission & 2 other* [*supra*].

17. Counsel as well asserted that a judge does not have to disqualify himself merely because one party has stated that in his opinion that he will not get a fair hearing, or that such party feels that the judge will be impartial or prejudiced as held in *Florence Chelangat Langat vs Timoi Farms and Estates Limited & another* [2015] eKLR. This view was also adopted in *Gitobu Imanyara & 3 others v Attorney General* [2012] eKLR and *Gem Investments Ltd v Prafulchand Raja* [2022] eKLR.

18. In view of that, Counsel contended that the circumstances herein invites this court to strike a balance between the principles of recusal of a judge against the exception to the rule which is the paramount duty to sit. According to Counsel, seeking recusal of the Honourable Judge amounts to a travesty of justice since Judges once appointed take an oath to dutifully uphold the values of *the Constitution* which include adherence to the rule of law and the right to fair hearing. Reliance was placed in *CG Wathana & Company Advocates vs Peter Mwangi Kariuki* (2020)eKLR where it was held that:

> "It is the right of every party to apply for a judge to recuse himself. This proceeds from the fact that justice must not only be done but be seen to be done and if a basis is established that justice will not be seen to be done, then the judge must give way. On the other hand judges have a duty to sit, hear and determine a case and it is assumed that absent a direct conflict of interest, they will discharge justice in accordance with the oath of office."

19. Like dependence was also placed in *Gladys Boss Shollei vs Judicial Service Commission and another* (2018)eKLR. To this end Counsel, argued that the petitioner in light of the cited law and authorities had not established how its application was merited and how his Lordship Justice Mugambi is incapable of determining this petition.

Analysis and Determination

20. The only issue that arises for determination in this ruling is:

Whether the petitioner's application for recusal is merited.

21. Fair hearing is a fundamental right that is recognized and protected under Article 50 (1) of *the Constitution* of Kenya which provides as follows:

> Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

22. In exercising their mandate of adjudication, Judges are required to observe certain fundamental principles some of which have been codified under the *Judicial Service (Code of Conduct and Ethics) Regulations*, 2020 under the *Judicial Service Act* (No. 1 of 2011).

23. For instance, Rule 36 requires that every judicial officer carry out the duties of the office with impartiality and objectivity in line with Articles 10, 27, 73(2) (b) and 232 of *the Constitution*. The Judge is required to avoid favoritism, nepotism, tribalism, cronyism, religious bias, or engaging in corrupt or unethical practices. Additionally in the discharge of their duties, Judges are expected to:

    a. uphold and apply the law;

    b. observe fairness and impartiality; and

    c. perform the duties of judicial office, including administrative duties impartially, competently, and diligently, without bias.

24. Where impartiality cannot be assured, a Judge ought to recuse himself. Rule 47 provides:

    1. A judicial officer may recuse himself or herself in any proceedings in which his or her impartiality might reasonably be questioned where the judicial officer—

        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;

        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. a member of the judicial officer's family has economic or other interest in the outcome of the matter in question.

    2. Recusal by a judicial officer shall be based on specific grounds to be recorded in writing as part of the proceedings.

    3. A judicial officer may not recuse himself or herself if—

        a. no other judicial officer can deal with the case; or

        b. because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.

25. The threshold for recusal was laid down in the English case of *Metropolitan Properties (Fg-C) Ltd Vs. Lannon & Others* [1969] 1 QB 577 as follows:

> " Disqualification was imperative even in the absence of a real likelihood of bias if a reasonable man would reasonably suspect bias."
>
> Acker LJ in R vs Liverpool City Justices, ex parte Topping [1983] 1 WLR 119 elaborated on the test applicable. The Court has to address its mind to the question as to whether a reasonable and fair - minded man sitting in Court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible. If the answer is in the affirmative, disqualification will be inevitable."

26. Supreme Court in *Jasbir Singh Rai & 3 others* (*supra*) gave the following guidelines to apply in determining recusal applications:

> "(6) Recusal, as a general principle, has been much practised in the history of the East African judiciaries, even though its ethical dimensions have not always been taken into account. The term is thus defined in Black's Law Dictionary, 8th ed. (2004) [p.1303]:
>
> > "Removal of oneself as judge or policy maker in a particular matter, [especially] because of a conflict of interest."
>
> (7) From this definition, it is evident that the circumstances calling for recusal, for a Judge, are by no means cast in stone. Perception of fairness, of conviction, of moral authority to hear the matter, is the proper test of whether or not the non-participation of the judicial officer is called for. The object in view, in the recusal of a judicial officer, is that justice as between the parties be uncompromised; that the due process of law be realized, and be seen to have had its role; that the profile of the rule of law in the matter in question, be seen to have remained uncompromised."

27. The Court of Appeal addressed its mind on the applicable test for a recusal application in *Philip K. Tunoi & Another vs. Judicial Service Commission & Another* (2016) eKLR upon review of the English decision of *R v Gough* (supra) before finally settling on the House of Lords decision in Porter v Magill (2002) by stating thus:

> " ... 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..."

28. The Court of Appeal in *Kaplana H. Rawal vs Judicial Service Commission & 2 others* (2016) eKLR remarked:

> " ... An application for recusal of a judge is a necessary evil. On the one hand it calls into question the fairness of a judge who has sworn to do justice impartially, in accordance

with *the Constitution* without any fear, favour, bias, affection, ill-will, prejudice, political, religious, or other influence. In such applications, the impartiality of the judge is called into question and his independence is impugned. On the other hand, the oath of office notwithstanding, the judge is all too human and above all *the Constitution* does guarantee all litigants the right to a fair hearing by an independent and impartial judge...

25. The Supreme Court of Canada expounded the test in the following terms in R. v. S. (R.D.)[1977] 3 SCR 484:

> "The apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold..."

29. The Court of Appeal went ahead and sounded a word of caution in *Galaxy Paints Company Limited vs Falcon Guards Limited* (1999) eKLR to Judges might be too eager or quick to disqualify themselves at the mention of the word recusal. The Court stated:

> " ... 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... "

30. In determining whether or not sufficient grounds have been raised for my disqualification in this Petition, I must consider therefore the grounds relied on by the applicant *vis-à-vis* the facts the Petition is based on in order to determine if a reasonable person aware of the circumstances and facts of this petition would reasonably apprehend bias on my part as the Judge Presiding over this matter.

31. In the Petition, the Petitioner sets out a clear setting specifying the bedrock upon which his case against the respondents rests. At paragraph 35 of the Petition, the Petitioner refers to what she terms as the 'primary issue at hand' concerning the Respondents. She0 states:

> "35. The primary issue at hand concerns the Respondents treatment of interviewees, which has drawn significant criticism due to their perceived abuse of power and mistreatment of individuals who come before them. Despite their status as guardians of law, their behaviour has been deemed unacceptable and has raised serious questions about their fitness for their role..."

32. From the above averment, it is crystal clear that the Petitioner is not confining his grievance primarily to the specific interviews that were conducted between October, 3 to November 3, 2022 but is raising a general concern. Further, the grievance appears directed at the interviewers, not interviewees.

33. Moving forward, the same theme appears in paragraph 36 of the petition which raises a concern that this petition is not time-bound and is directed at interviewers, not interviewees. in Paragraph 36 of the Petition, the petitioner alleges:

> "The respondents' mistreatment of interviewees during the interviews for the position of Chief Justice is a matter of public record. One of the aggrieved interviewees, Professor Makau Mutua, expressed discontent in his Sunday column, where he criticized the Respondents failure as guardians of legality and the damage they caused to the credibility of the publicly televised interviews..."

34. Another pointer that the grievance is beyond the specific timeframe now being relied on by the Petitioner in the Notice of Motion to seek my recusal is to be found in the reading of paragraph 37 of the Petition which states:

> "... It is submitted that various civil society groups, including but not limited to Katiba Institute, International Commission of Jurists and Kenya for Peace with Truth and Justice, have been consistently and vehemently calling out the Respondents since 2016. In a joint statement, these groups decried the Respondents arbitrary and unconstitutional manner of conducting interviews for candidates. The statement further revealed that certain candidates were subjected to superficial, mundane and irrelevant questions, thus compromising the integrity and impartiality of the process..."

35. The above exposition which is contained in the petition sharply contrasts with the ground that seeks my recusal from this Petition. Whereas the application says the petition is about the interviews conducted by the Respondents between 3rd October to 3rd November, 2022; where I participated as an interviewee for the position Judge, Petition shows a grievance that predates the interviews conducted between 3rd October, 2022 and 3rd November, 2022.

36. If I allow the application, it would mean that many other Judges including those that were appointed pre-2022 will not be able to sit and hear the Petitioner's grievances as the time frame of his grievance is much wider. Judges have a duty to sit and it is in the interest of justice that I prevent an unwarranted crisis in the administration of justice that may have the ripple effect of knocking out many more Judges from the matter at the whims of the Petitioner.

37. Having considered the Petitioner's fears expressed in this Notice of Motion application *vis-a-vis* the Petition he has filed in its totality, I do not think any reasonable man, aware of the extent of the Petitioner's grievance, and being conscious of the obligation that comes with the solemn oath of office of Judge to defend *the Constitution* and do justice without fear or favour will even in the remotest sense habour the apprehension put forth by the Petitioner of a likelihood of bias in the determination of the issues raised in the Petition.

38. I am not satisfied that the threshold for my disqualification has been met. I thus dismiss the application and order that the trial on merits of this Petition shall proceed before this Court.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF APRIL, 2024.

.....

L N MUGAMBI

JUDGE