Chepngeny & another v Political Parties Disputes Tribunal & 3 others; Devolution Empowerment Party & another (Interested Parties) (Constitutional Petition E009 of 2024) [2024] KEHC 11783 (KLR) (3 October 2024) (Ruling)

Neutral citation: [2024] KEHC 11783 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERICHO

CONSTITUTIONAL PETITION E009 OF 2024

JK SERGON, J

OCTOBER 3, 2024

THE MATTER OF ALLEGED INFRINGEMENT OF THE PROVISIONS OF ARTICLES 1(1), 1(3), 2(1), 2(2), 2(4), 10, 19, 20(1), 20(2), 20(3)(8), 20(4), 21(1), 21(3), 22, 23(1), 23(3), 24 (1), 27(1), 36, 37, 38(1), 38(3), 47, 48, 91, 92, 165(3), 165(6), 165(7), 232(1)(E), 258, 259(1), 259(3) AND 260 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT

AND

IN THE MATTER OF THE POLITICAL PARTIES ACT

AND IN THE MATTER OF THE POLITICAL PARTIES DISPUTE TRIBUNAL COMPLAINT NUMBER E007 OF 2024

BETWEEN

SOLOMON CHEPNGENY ..... 1ST PETITIONER

EVERTON WAFULA KHAEMBA ..... 2ND PETITIONER

AND

THE POLITICAL PARTIES DISPUTES TRIBUNAL ..... 1ST RESPONDENT

PAMELA GAKII GITOBU ..... 2ND RESPONDENT

THE REGISTRAR OF POLITICAL PARTIES ..... 3RD RESPONDENT

THE NATIONAL EXECUTIVE COMMITTEE, THE DEVOLUTION EMPOWERMENT PARTY ..... 4TH RESPONDENT

AND

THE DEVOLUTION EMPOWERMENT PARTY ..... INTERESTED PARTY

MILTON MUGAMBI IMANYARA, THE SECRETARY-GENERAL DEVOLUTION EMPOWERMENT PARTY ..... INTERESTED PARTY

RULING

1. The Petitioners filed a Petition and Application dated 26th July 2024 seeking various orders.This court issued interim orders in the application and directed parties to file their responses and submissions in respect to the petition and set down the matter for ruling on 24th September, 2024. However, in the interim, the 1st interested party filed a chamber summons dated 2nd August, 2024 seeking the recusal and/or disqualification of the Honourable Justice Joseph K. Sergon from any further conduct of this matter.

2. Therefore the application coming for determination is the chamber summons dated 2nd August, 2024 for the recusal and/or disqualification of the Honourable Justice Joseph K. Sergon.

3. The application is based on the grounds on the face of it and supporting affidavit of Haron Mutwiri Abuana, the Executive Director of the 1st Interested Party, the Devolution Empowerment Party (hereinafter "the 1st Interested Party" or "Applicant"). He avers that he is well seized of the facts and issues arising in the matter and being duly authorised by the 1st Interested Party, is competent to swear this affidavit on its behalf and on behalf of the National Executive Committee, 4th Respondent/ Applicant herein.

4. The 1st interested party avers that he has credible information and strong reasons to believe that the suspended Secretary General Milton Mugambi Imanyara, the 2nd Interested Party is a close friend of the Honourable Justice Joseph K. Sergon and they closely interacted when Honourable Justice Joseph K. Sergon was based in Nairobi.

5. The 1st respondent avers that he is also aware that the real petitioner and beneficiary of the interim orders given by the Honourable Justice Joseph K. Sergon is Milton Mugambi Imanyara, the 2nd Interested Party herein and not the 1st or 2nd Petitioners, who are mere proxies.

6. Solomon Chepngeny, the 1st petitioner filed a replying affidavit in response to the application for recusal.

7. The 1st petitioner avers that the 1st interested party has members throughout Kenya and as such, its members have a right to sue anywhere in Kenya, including the High Court in Kericho.

8. The 1st petitioner avers that the application is unfounded and its basis are apprehensions and wild allegations that cannot be substantiated by any evidence.

9. The 1st petitioner avers that the attachments annexed to the supporting affidavit of one Haron Mutwiri Abuana do not in any way prove any nexus between the Honourable Judge, Dr. Joseph Sergon and the 2nd interested party.

10. The 1st petitioner avers that the applicants ought to have appealed against the orders issued by this court instead of canvassing for review vide the application dated 2nd August, 2024.

11. The 1st petitioner avers that the applicants have not provided any evidence showing that the Honourable Judge is a member of the 1st Interested Party and therefore conflicted in the matter.

12. The 1st petitioner avers that in the present case, the applicants have not furnished proof on how the Honourable Judge is the ultimate beneficiary of the final outcome of the petition.

13. Milton Mugambi Imanyara, the 2nd interested party filed a replying affidavit in response to the application for recusal.

14. The 2nd interested party avers that he is not a personal friend of the Honourable Judge and further that section 107 of the *Evidence Act* states that he who alleges has the burden of proof. That even so, the applicants have not provided any scintilla of evidence to prove the allegations made against the Honourable Judge or the 2nd interested party herein.

15. The 2nd interested party avers that an application for recusal is an application for orders in personam and not an application for orders in rem and as such, the instant application is an attack on the person of the Honourable Judge and the application must be met back with the disdain and contempt that it deserves.

16. The 2nd interested party avers that the applicant is litigating against the petitioners' right to sue through the instant application.

17. The 2nd interested party avers that he is not the petitioner nor are the petitioners acting on his behalf or at his behest in the filing of the impugned petition.

18. The 2nd interested party avers that upon reading of the petitioners' application dated 26 July, 2024 it is clear that the applicants prayed for any other reliefs that the Court deemed fit and that the Honourable Judge exercised his discretion and made relevant orders that he deemed fit, through the exercise of his discretionary powers.

19. The 2nd interested party avers that judicial recusal is the withdrawal of a judicial officer from ongoing proceedings, for reason of a conflict of interest, bias, or lack of impartiality and it therefore cannot be based on a litigant's mere displeasure, whim, or unfounded apprehension.

20. The 2nd interested party avers that he had been advised by his Advocates on record, that recusal is necessitated where it is proved beyond peradventure, speculation, conjecture, and sheer paranoia, that a judicial officer will mishandle a case before him or her because of actual bias or apprehension of bias.

21. The parties complied with the directions of this court and filed their submissions in respect to the application for recusal, which this court has duly considered.

22. The 4th respondent and 1st interested party, the applicants herein filed joint submissions in respect to the application for recusal.

23. The applicants reiterated that the petitioners filed an application for interim and conservatory orders alongside their petition before this Honourable Court. Justice Joseph K. Sergon, after considering the application, issued sweeping ex parte interim orders at the interlocutory stage. The applicants argued that the interim orders not only prematurely determined the core issues of the petition but rendered any further attempts to file opposing responses a mere charade—an exercise in futility and a blatant waste of time.

24. The applicants contended that they have reasonable apprehension that the Honourable Justice Joseph K. Sergon is compromised and biased and cannot handle this matter in an objective and impartial manner. The applicants maintained that the ex parte interim orders issued by Justice Sergon clearly demonstrate actual bias. Moreover, any reasonable person, upon reviewing these orders, would inevitably harbour a well- founded apprehension of bias, further justifying the need for recusal.

25. The applicants submitted that by filing the petition in Kericho, it is obvious that this is a clear case of forum shopping. The applicants contended that the institution of the petition in Kericho runs afoul of the provisions of Rule 8 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* which provides as follows:

Place of filing.

"1) Every case shall be instituted in the High Court within whose jurisdiction the alleged violation took place.

2) Despite sub rule (1), the High Court may order that a petition be transferred to another court of competent jurisdiction either on its own motion or on the application of a party."

26. The applicants in support of the application for recusal, cited the case of R v Jackson Mwalulu & Others C.A. Civil Application Nai No. 310 Of 2004 (Unreported) where the Court of Appeal stated that: "...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."

27. The applicants relied on regulation 21 Part II of the *Judicial Service (Code of Conduct and Ethics) Regulations 2020*, which states that 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;

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."

28. The applicants maintained that the instant application meets the threshold for the recusal.

29. The petitioners filed joint submissions and contended the contents of the application for recusal including the supporting affidavit are defamatory in nature and impute that the party members cannot

sue party officials where they act contrary to the *constitution* and the relevant laws. The petitioners argued that the 1st interested party has members throughout Kenya and as such, its members have a right to sue anywhere in Kenya, including in this Honourable Court in Kericho.

30. The petitioners contended that section 107 of the *Evidence Act* states that he who alleges must prove. They contended that the attachments annexed to the supporting affidavit of one Haron Mutwiri Abuana do not in any way prove any nexus between the Honourable Judge, Dr. Joseph Sergon and the 2nd interested party herein or to the petitioners.

31. The petitioner contended that inorder to establish bias, the person making the decision or is involved in making that decision must have a direct benefit from the decision and that the applicants have not demonstrated how the judge is the ultimate beneficiary of the final outcome of the petition.

32. The 2nd interested party filed submissions in opposition to the application for recusal dated 2nd August, 2024 and he maintained that the applicants have not discharged their burden of proof. The 2nd interested party cited section 107 (1) of the *Evidence Act* which states that; "Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." and section 109 of the *Evidence Act* which states that; "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person." The 2nd interested party relied on the case of *Margaret Wanjiru Ndirangu & 4 others v Attorney General* [2020] eKLR where the court quoted the case of *CMC Aviation Ltd v Crusair Ltd* (No1) [1987] KLR 103, stating that "proof is the foundation of evidence". The 2nd interested party maintained that the applicants have not provided evidence to show any direct or indirect connection between the 2nd interested party and the Honourable Judge.

33. The 2nd interested party contended that the case was filed by the petitioners in an attempt to protect their constitutional rights that had been violated by the respondents, they were therefore seeking ex parte orders and other orders that the court deemed fit and just.

34. The 2nd interested party cited the Ugandan case of *Uganda Polybags LTD v Development Finance Company Ltd & Others* [1999] 2 EA 337, where it was held that litigants have no right to choose which judicial officer should hear and determine their cases since all judicial officers take oath to administer justice to all people impartially and without fear, favour, affection or ill-will.The 2nd interested party contended that the application does not reveal any grounds warranting the recusal of the Honourable Judge and therefore the application should be dismissed with costs.

35. This court has considered the pleadings and submissions in respect to the application and the sole issue for determination is whether the applicants have set out a strong and cogent case of the recusal and/or the disqualification of the Honourable Judge in the instant matter. Having considered the affidavits filed by the applicants, it is the finding of this Court that the applicants have not aptly demonstrated any ground (s) warranting the recusal of the honourable judge in this matter.

36. It appears that the crux of the application is based on interim orders issued by this court in the respect to the notice of motion dated 26 July, 2024 where the applicants sought for several reliefs and any other reliefs that the Court deemed fit. This court, having considered the application, made relevant orders through the exercise of discretionary powers and the exercise of discretion cannot be the basis for a litigant to demand the recusal of a judge or judicial officer. The applicants, if aggrieved by the said orders, ought to pursue the appropriate legal channels they can either seek review or appeal.

37. This court has considered the case of *Republic v Mwalulu & Others* [2005] 1KLR whereby the Court of Appeal in addressing the question of disqualification of a judge stated that: -

> "i). When the 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 specifically be alleged and established.
>
> ii). In such cases the court must carefully scrutinise the affidavits on either side, remembering that when some litigants lose their case they are unable or unwilling to see the correctness of the verdict and are apt to attribute that verdict to bias in the mind of the Judge, Magistrate or Tribunal.
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> iii). The court dealing with the issue of disqualification is not; indeed, it cannot, go into the question of whether the officer is or will actually be biased. All the court can do is to carefully examine the facts which are alleged to show bias and from those facts draw an inference, as any reasonable and fair-minded person would do, that the judge is biased or is likely to be biased." This court has carefully considered the facts alleged to show bias and finds that these are unsubstantiated thereby not warranting the recusal and/or disqualification. This court has considered the findings in *Kaplan & Stratton v Z Engineering Construction Limited & 2 Others* {2002} KLR 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."

38. Based on the foregoing, the chamber summons dated 2nd August, 2024 for the recusal and/or disqualification of the Honourable Judge has no merit and is hereby dismissed and the costs of this application be borne by the applicants.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 3RD DAY OF OCTOBER, 2024

J. K. SERGON

JUDGE

In the Presence of:-

C/Assistant - Rutoh

Mbaya for the 4th Respondent and 1st Interest Party

Kembero for the Petitioners

Kabwu for 2nd Interested Party

Ogutu for the 1st Respondent