In re Estate of James Boro Karugu (Deceased) (Succession Cause E916 of 2023) [2024] KEHC 13016 (KLR) (Family) (18 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13016 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

SUCCESSION CAUSE E916 OF 2023

PM NYAUNDI, J

OCTOBER 18, 2024

IN THE MATTER OF THE ESTATE OF JAMES BORO KARUGU (DECEASED)

RULING

1. This ruling relates to Application dated August 9, 2024 presented under Section 7,22,45,47,68,70 and 76 of the *Law of Succession Act*; Rule 7(5), 17(5) and 51 of the *Probate and Administration Rules*, in which the Applicants articulates a total of 16 prayers. When the matter came up for directions I directed that we deal with the prayer requiring me to recuse myself as a preliminary issue; That prayer is framed thus

   The case file in this matter be placed before the Presiding Judge in the Family Division at Milimani Law Courts for the allocation of the case to a fresh judge who is available to hear the matter, including pending objections, and applications in an impartial and expeditious manner.

2. The Application is supported by the Affidavit of the Applicant Victoria Nyambura Karugu who at paragraph 50 ventilates the reasons for which I should recuse myself, these include

   a. Failure to certify Application dated 14th August 2023 as urgent

   b. Failure to give reasons for the non-certification of the Application as urgent

   c. Failure to progress the matter to the prejudice of the legitimate beneficiaries of the Estate. It is submitted that the matter has been mentioned close to 6 times and I have been 'inexplicably unavailable'.

3. The Applicant is of the view that the matter should be assigned a different Judge who is available to hear the matter expeditiously and impartially.

4. In response, Eric Mwaura Karuga filed replying affidavit opposing the prayer for recusal and stated that a Judicial Officer has unfettered discretion to certify an application as being urgent or not. That the applicant's application for recusal on this ground is malicious. That there are no justifiable reasons to warrant the recusal of the trial judge and that the application is meant to intimidate the Judge from

recusing herself. The applicant's application is an intended forum shop for a Judge of her own choice and hence it's an abuse of the court process. That the grounds for recusal are unmerited and without any basis and the same should be dismissed with costs. At paragraphs 5-11 of his affidavit he has set out what he states is the chronology of Court mentions and appearances in the matter.

5. Vide Affidavit sworn on 24th September 2024 Adam Chege who states he is a beneficiary to the Estate also opposes the Application and states that the allegations of bias and impartiality are not substantiated.

6. The matter was canvassed via oral submissions in open Court. Counsel for the Applicant, submitted that after this court declined to certify the application as urgent and to stop the proceedings as sought, the file went into a state of comatose. The mentions (no less than 7 times, before the Court and the Deputy Registrar's have not progressed the matter).

7. In the words of the Counsel it has been 'a comedy of excuses' (either the court is on leave or it is indisposed). The Applicant and her counsel fault the Court for failing to stay proceedings and thus enabling the 1st, 2nd and 3rd Respondent to act as executors and prejudice the beneficiaries of the estate and are persuaded that the Court is therefore partial and biased against the Applicant.

8. Counsel further submitted that the matter being fresh the Court should place it before the Presiding Judge so that it can be allocated to a Judge who is available to hear the matter expeditiously. The Applicant is frustrated further that their protestations as to the delay have not been favored with a response.

9. The Applicants rely on the decisions in the cases of *Philip K. Tunoi & Anor v Judicial Service Commission & Anor* [2016] eKLR; *Republic v Assa Kibagendi Nyakundi* [2022] eKLR and *R v S (R.D)* [1977]3 SCR 484 on the test to be applied to determine the existence or otherwise of bias and principles laid down by judicial precedent on when a court should recuse itself from hearing a matter.

10. In response Counsel for the 6th Respondent, submitted that the Application had not met the required threshold and relies on the decision in *Rawal v Judicial Service Commission & Anor; Okoiti (Interested Party); International Commission of Jurists & Anor (Amicus Curiae)* [2016] KECA 717 (KLR).

11. Counsel submitted that the Application is frivolous as it has not been demonstrated that in failing to certify the Application as urgent the court had wrongly exercised its discretion.

12. The 6th Respondent further relies on the decisions in the cases of; *Bernert v Absa Bank Ltd* [2010] ZACC 28 as cited in *Rawal & 2 others Judicial Service Commission & Anor; Okoiti (Interested Party); International Commission of Jurists & Anor (Amicus Curiae)* [2016] KESC 1 (KLR); *Rawal v Judicial Service Commission & Anor; Okoiti (Interested Party); International Commission of Jurists & Anor (Amicus Curiae) [*2016] KECA 717 (KLR); *Republic v David Makali & 3 Others* [1994] eKLR and *Philip K. Tunoi & Anor v Judicial Service Commission & Anor* [2016] eKLR

13. On behalf of Adam Chege a beneficiary it is submitted that the Application has no merit and the threshold has not been met. Like the 6th Respondent it is submitted that that the Court cannot be faulted for exercising its discretion in declining to certify the application as urgent. It is submitted that the Application is an affront to the authority of the Court.

14. Counsel for Wambui Mwangi a beneficiary also opposes the Application and submits that every time the Court was not sitting directions were given to move the matter forward.

15. In summing up the Submissions, the Applicant submits that she is persuaded that the Court is biased against her.

Analysis and Determination

16. The main issue for determine is whether the applicant has demonstrated reason for me to disqualify myself from presiding over this matter.

17. At the outset I wish to clarify that although lengthy submissions were made castigating Deputy Registrar Hon. Catherine Nganga I have excluded reference to them in this ruling as this ruling is limited to whether or not I should recuse myself. It has not been suggested that I am responsible for the actions or inactions as alleged and therefore I defer the decision on the participation of Hon. Nganga to a later date when it will be comprehensively argued.

18. Counsel have correctly elucidated on the law and I need not restate those principles as they have been eruditely articulated. A charge of bias against a Judge by a litigant must be afforded serious consideration because it threatens a litigant's right to fair trial as provided for under Article 50 of the *Constitution* which states-

> 50(1) 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

19. By constitutional edict therefore parties are provided with means to demand the recusal of a Judge where they are of the impression that the Judge is biased. The flip side of this is that Judges by virtue of their oath of office have a duty to sit. This was well articulated by Hon. Ibrahim J in his concurring ruling in *Shollei & another v Judicial Service Commission & another* (Petition 34 of 2014) [2018] KESC 42 (KLR) (3 July 2018) (Ruling) where he stated-

> (25) Tied to the constitutional argument above, is the doctrine of the duty of a judge to sit. Though not profound in our jurisdiction, 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:
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> "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)
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> [27]. In the case of *Simonson v General Motors Corporation* USDC p.425 R. Supp, 574, 578 (1978), the United States District Court, Eastern District of Pennsylvania, had this to say:-
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> "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" . . ."

20. In Philip K Tunoi case (*Supra*), the Court of Appeal outlined the following as principles to guide a court

> [45] ..... " How should Judges treat the subject of disqualification when raised before them"
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> ....when the courts in this Country are faced with such proceedings as these, 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.

21. Thus as was stated in *Richard Onyino Simwa vs Joshua Angelei and Others* Kitale ELC Case No 69 of 2019 self-recusal is not,

> " a proposal that should be readily acceded to by judges, partially for the reason that sound grounds must be first proved, and secondly judges have a duty to sit that should not be incommoded by frivolous applications for self-recusal. That duty is based on the oath of office they took. Finally, forum-shopping by crafty litigants should be discouraged."

22. This observation followed the court's examination of decisions in *Hon. Kalpana H. Rawal v Judicial Service Commission & 2 Others* Civil Appeal (Application) No. 1 of 2016 [2016]; *Galaxy Paints Co. Ltd V Falcon Guards Ltd* [1999] eKLR; *J G K v F W K* [2019] eKLR; *Gladys Boss Shollei v Judicial Service Commission & another* [2018] eKLR; *Andrew Alex Wanyandeh -vs- The Attorney General & Kenya Railway Corporation*; Nairobi Milimani HCCC No. 844 Of 2005 and *Republic v Mwalulu & 8 Others*: [2005] 1 KLR.

23. In the Hon. Kalpana H. Rawal the Court of Appeal of Kenya stated as follows:

> " ... Before we consider the merits of the application, however, there are a few issues raised by the parties which we must dispose of. First, it is obvious from the test above that there is no basis for the rather elastic test propounded by Dr. Khaminwa, where a judge must automatically disqualify himself or herself upon the making of a bare allegation by any of the parties. We have not come across any authority in support of the proposition and Dr. Khaminwa did not cite any. On the contrary, decisions abound that judges should not recuse themselves on flimsy and baseless allegations. As was stated in *Locabail UK Ltd Vs Bayfield Properties Ltd* [2000] QB 451 a judge "would be as wrong to yield to a tenuous or frivolous objection as he would ignore an objection of substance."

24. Gikonyo J in the case of *J G K v F W K* [2019] eKLR also emphasized that recusal should not be undertaken lightly or anyhow, but, upon a conscientious decision based on plausible reasons backed by evidence, for example, bias or prejudice or conflict of interest or personal interest on the part of a judge and he underlined that the administration of justice ought to be free from blackmail. At the same time, he observed that what must therefore be avoided is a practice that may encourage parties to 'shop' for judges who they believe will be favourable to their causes.

25. Justice Hatari Waweru in *Andrew Alex Wanyandeh -vs- The Attorney General & Kenya Railway Corporation*; Nairobi Milimani HCCC No. 844 of 2005 observed that litigants cannot choose their judges and concurred with earlier decisions stating that that applications for disqualification of judges should not be lightly allowed as that would tend to erode public confidence in the courts and the determination of justice.

26. In the case of *Republic v Mwalulu & 8 Others*: [2005] 1 KLR the Court of Appeal stated that the test is objective and the facts constituting bias must be specifically alleged and established and that that would be achieved by scrutinizing the affidavits filed by either side.

27. 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;

(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. Regulation 9 of the *Judiciary Code of Conduct* emphasizes the importance of impartiality of a Judge. Regulation 9(1) provides:

> " A Judge shall, at all times, carry out the duties of the office with impartiality and objectively in accordance with Articles 10, 27, 73(2) (b) and 232 of the *Constitution* and shall not practice favoritism, nepotism, tribalism, cronyism, religious and cultural bias, or engage in corrupt or unethical practices."

29. As was stated in *Kaplana Rawal vs Judicial Service Commission and 2 Others* (2016) eKLR;

> 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 application, 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 too human and above all the Constitution does guarantee all litigants the right to a fair hearing by an independent and impartial Judge.

30. From the averments herein, the reason advanced for my recusal is that I did not certify the application dated 14th August 2023 as urgent and further I have not taken measures to progress the matter. The Applicant is persuaded that the matter has progressed in the manner it has on account of my bias against her. The nature and basis of this bias on my part has not been stated.

31. The record shows that, when the matter first came up I gave directions on parties filing responses and preparing for the hearing of the applications On the date set for mention to confirm compliance the parties were not present and I referred the matter be mentioned before the Deputy Registrar to ensure compliance so that the Application can be set down for hearing.

32. It is unfortunate that the matter was listed before me on two occasions when I happened to be leave and on one occasion I was unwell. Whereas I understand and appreciate the Applicant's frustration at the time it has taken to hear and finalise the matter, I am not satisfied that it has been demonstrated that I have any bias against the Applicant.

33. I find therefore that the Applicant has not presented any evidence of circumstance that would give rise to prejudice or jaundiced view on my part and I therefore dismiss the Application with no order as to costs.

34. In conclusion, I do agree with the reflection by Mr. Murgor SC that applications for recusal of a Judge require courage, indeed Judges must jealously and courageously guard their constitutional obligation to dispense justice without fear or favour, it is my intention to do so in this and every matter that is assigned to my docket.

DELIVERED ON THE VIRTUAL PLATFORM, DATED AND SIGNED AT NAIROBI THIS 18th DAY OF OCTOBER, 2024.

PATRICIA NYAUNDI

JUDGE

In the presence of:

Court Assistant Fardosa