Mukombo v Mukeni (Civil Appeal E069 of 2024)
[2024] KEHC 12447 (KLR) (16 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12447 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITUI

CIVIL APPEAL E069 OF 2024

RK LIMO, J

OCTOBER 16, 2024

BETWEEN

MOSE MULI MUKOMBO ..... APPELLANT

AND

PATRICK MUKENI ..... RESPONDENT

RULING

1. Before me is a Notice of Motion dated 13th September 2024 where the applicant Mose Muli Mukombo, the appellant herein is seeking the following prayers namely;

    i. ..spent

    ii. That there be stay of execution pending interpartes hearing and determination of this application.

    iii. That this court does recuse itself from further proceeding with this matter for the reason that the reason of perceived bias and prejudice against the applicant.

    iv. That the file be transferred to the nearest High Court for hearing and determination of the pending applications and the appeal.

    v. That costs be in cause.

2. The applicant has cited the following grounds namely;

    i. That the applicant filed an application dated 21.8.2024 under certificate of urgency for stay of execution pending appeal.

    ii. That to what he terms “astonishment” and “bemusement”. This court granted orders on an undated application despite his application being dated.

iii. That upon raising the issue and pointing out the error this court issued fresh orders without an apology or explanation.

iv. That the court gave orders that there was no imminent danger or execution and ailed to confirm the application urgent or issue stay.

v. That the applicant was arrested and committed to civil jail on 28.8.24 by the trial court facts which had been brought out as imminent in the application before court.

vi. That the applicant filed another application dated 4.9.24 before this court seeking to set aside the committal orders but this court took a 'whooping 5 days' to consider the certificate of urgency.

vii. That this court at interim stage to determine the entire application for stay in limine by granting temporary orders of stay on condition that the applicant deposit security of Kshs. 800,000 or a surety of a similar amount in court.

viii. That it is only after foregoing facts that the appellant has been able to discern that this court previously interfered with the case in the lower court by issuing what he terms "order *suo moto* and/or exparte" in transferring the matter from Mwingi Magistrates Court to Kitui Magistrates Court.

ix. That the handling of this matter has raised suspicion of collusion necessating this application.

x. This application is supported by the applicant's affidavit sworn on 13.9.2024 where he has majorly reiterated the above grounds.

xi. He avers that the respondent being an employee based in Mwingi, within Kitui County may have influenced the trajectory of this appeal.

3. He avers that he was arrested and committed to Civil Jail because this court did not issue stay orders. He faults this court for giving conditions for stay of execution without hearing him. Counsel for the applicant contends that though the orders issued were temporary the orders determined his application per se because it gave a condition that the applicant does deposit a sum of Kshs. 800,000 or a surety of a similar amount.

4. Ms Kiendi, Counsel for the applicant submits that the appellant has lost confidence on the impartiality of this court to determine this matter fairly and pray that this appeal be transferred to Machakos High Court.

5. The Respondent, Patrick Mukeni has opposed this application through grounds of opposition dated 17.9.24. The respondent terms this application scandalous, frivolous, vexatious and an abuse of court process. He contends that the allegations made are not supported by material facts and are full of falsehood.

6. The respondent submits that it is the applicant who made an application dated 16.6.2021 for the case to be transferred from Mwingi Law Courts to Milimani Magistrates Court in Nairobi. He contends that he had on his part preferred the case to be transferred to Kyuso given that he was based in Mwingi Law Courts as a judicial staff. He avers that this court heard the application by the applicant and his response and ruled that the case be transferred from Mwingi Magistrates Court to Kitui Magistrates Court. He further submits that the ruling on transfer was delivered in the presence of the counsel who acted then for the applicant.

7. He further faults the applicant for filing an undated application and that the applicant cannot blame the court for referring to the said application as undated.

8. He also faults the applicant for trying to frustrate his efforts to enjoy fruits of his judgment. He states that the trial in the lower court began in 2021 though the case was filed in 2017 and that judgment was entered on 1.8.2024. He states that he has suffered for 5 years because he is paying a loan.

9. He submits that the applicant has filed numerous applications which have left him confused.

10. He argues that he is a judiciary staff and that fact will not change even if this case was to be transferred to any other court in Kenya.

11. He faults the advocates currently on record stating that they failed to follow due process by filing notice of change of advocates because there was a former counsel on record who acted for the applicant.

12. This court has considered this application and the response made by the respondent who appears in person.

13. This is an application mainly on recusal. The applicant's counsel never made any representations on prayer 2 of the application and the same have not been canvassed by both parties will not be subject of this ruling.

14. An application for recusal of a Judge or a Judicial Officer from entertaining a case is a serious matter because it has a bearing on the fair administration of justice. The reasons for recusal must be clear, objective and specific.

15. In the case of *Republic vs. Jackson Mwalulu & others* (Civil Application No. Nairobi 310 of 2004), the Court of Appeal clarified the issue when it held as follows;

> " 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 public at large a reasonable doubt about fairness of the administration of justice. The test is objective and the facts constituting bias must be specifically alleged and established....".

16. Parties approaching a Courts are entitled to a fair hearing. A fair hearing is a fundamental right codified and protected under Article 50 (1) of the *Constitution* of Kenya.

The same states 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".

Courts are therefore required to observe certain fundamental principles some of which have been codified under *Judicial Service (Code of Conduct & Ethics) Regulations, 2020* under *Judicial Service Act* (No. 1 of 2011).

17. Rule 36 of the said *Rules* for instance requires every Judicial officer to exercise his/her mandate and carry out their duties with impartially and objectively in line with Articles 10,22, 73 (2) and 232 of the *Constitution*. A Judge is required to avoid favourism, nepotism, tribalism, cronyism, religious bias or engage in unethical practice.

18. A court is expected in discharging its judicial and administrative duties to observe the following;

i. Uphold and apply the law

ii. Observe fairness and impartiality

iii. Perform the duties of a Judicial office including administrative duties impartially competently and without bias.

19. Rule 47 of the above cited *Rules* provides situations where a Judge can recuse himself or herself. The situations are where the Judge or Judicial Officer;

a. is a party in the proceedings

b. was, or is a material witness in the matters in controversy

c. has personal knowledge of disputed evidentiary facts concerning the proceedings

d. has actual bias or prejudice concerning a party

e. has personal interest or is in a relationship with a person who has personal interest in the outcome of the matter

f. had previously acted in the matter as an advocate for a party in the proceedings

g. is precluded from hearing the matter for any other sufficient reasons or

h. a member of the Judicial officer's family has economic or other interest in the outcome of the case.

20. The law relating to recusal is therefore clearly set out but it is never easy for a court to entertain. This is the situation that the court of Appeal found itself in the case of *Rawal vs. Judicial Service Commission & Another Okoiti (Interested party, ICJ & Another (Amicus curice)* 2016 KECA 717 (KLR) 11March 2016 where it made the following observations:

> " .....an application for recusal of a Judge is a necessary evil. On 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, 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".

The court went on to state that when a reasonable basis exist, an application for recusal can be made and considered and provided useful guidelines on the threshold or test required for recusal by referencing the decisions in *Attorney General of Kenya – vs- Prof Anyang' Nyongo & Others* (EACJ. Application No. 5 of 2007) Where the East African Court of Justice held:

> " we think that the objective test of "reasonable apprehension of bias" is good law. The test is stated variously but amounts to this ; do the circumstances give rise to a reasonable apprehension in the mind of the reasonable, fair minded and informed member of the public that the Judge did not (will not) apply his mind to the case impartially needless to say, a litigant who seeks disqualification of a Judge comes to court because of his own perception that there is appearance of bias on the part of the Judge. The court, however, has to envisage

what would be the perception of a member of the public who is not only reasonable but also fair minded and informed about all the circumstances of the case."

21. Having set out the law and case law, this court will now analyse and examine the grounds or allegations made by the applicant to determine if it meet the test or threshold as stipulated above.

22. The 1st ground advanced is that this court on 26.8.24 upon being moved by an application dated 21.8.24 seeking a stay of execution declined to certify the application urgent and referred to his application as "undated". He claims that he raised the issue with the Registry and that this court then issued fresh orders declining to certify the matter urgent observing that there was lack of evidence that execution was imminent.

23. The applicant takes issue with the same but this court has checked the record and there was no formal complaint raised by the applicant's counsel. It is also important to note that applications under certificate of urgency are usually dealt with by most courts online. This court dealt with the applicant's application dated 21.8.2024 and other applications on the said date and while I may not rule out a mix up of the applications dealt with on that day, the same could have been a genuine mistake. What is however clear is that the order issued on 27.8.24 was on the basis of the evidence placed before court. There was no basis or evidence of urgency attached to the said application. There is no doubt or uncertainty over the decision made by this court with respect to declining to certify the matter urgent or giving temporary orders. This court dealt with the application filed under certificate of urgency and rendered itself and if the applicant was aggrieved, the best avenue was either to appeal to an appellate court or apply for review but he cannot fault this court for bias. The fact that this court gave conditions for stay does not show bias but regard to the law.

24. The other ground advanced is that this court took what he terms "whooping 5 days" to consider his application dated 4.9.2024 filed under certificate of urgency. What the applicant has however fails to understand is that when the application dated 4.9.24 was filed, and actioned to me this court was on recess. As a matter of fact, there was an official wellness retreat at Ciala Resort Kisumu as from 2nd September where all Judges of Superior Courts attended and which was presided over by the Hon Chief Justice of Kenya. The activities at the retreat were packed but I did try to get time to deal with the applications under certificate of urgency filed including that of the applicant. The allegation that I took a "whooping 5 days" is merely sensational and in my view made by a party who appears to be more aggrieved by the conditions given for stay of execution than anything else. It is instructive to note that 7th and 8th September fell on a weekend and this court dealt with the matter on 9.9.2024 which was Monday.

25. This court dealt with what was placed before its family and within reasonable time. The order of deposit of Kshs. 800,000/= or availing a surety to get a temporary stay was also in my view fair and contrary to what the applicant states that order was not final. The date for interparties was set for 18.9.24 and the order is quite clear on that.

26. This court does not see how a reasonable person or a fair-minded person can term the order as biased or see the actions of this court as prejudiced.

27. Thirdly, the applicant has faulted this court for having previously and on *suo moto* basis ordered for the transfer of the lower court's case from Mwingi to Kitui law courts. However, a look at the records shows that the allegation is false as submitted by the respondent. In the first place, the applicant himself moved this court vide Kitui H.C Misc Application No. E049/2021 and appeared in this court through Chenge Advocate. The application was dated 16.6.2021 and after hearing both the applicant and opposition by the respondent this court found that it was fair to transfer the case from Mwingi law

courts where the respondent works as a Judiciary staff. This was purely to avoid the perception of bias. The court ruled that the case be transferred to Kitui CM's Court and that is where the matter was tried and a judgment entered. The applicant did not appeal or take any step to express grievance regarding transfer. It is evidently belated and in bad faith for him or his counsel to turn and state that this court acted *suo moto*. Noting can be far from the truth as evident by Kitui HC Misc application No. E049/21.

28. There is also the other issue raised by the respondent herein which is the fact that transferring this case to another High Court will not change the fact that he is a Judicial Staff. This court for the record did not know the applicant personally and more so when I issued the orders, I had no idea who the parties were. The issue of being a Judiciary staff was only brought to my attention in this present application. An application for stay of execution does not operate as an automatic stay and the applicant being represented by counsel should be well advised the provisions of Order 42 Rule 6 *Civil Procedure Rules*.

29. The other issue raised by the respondent is that the applicant's counsel is not properly on record and that maybe informed by the fact that in the lower court the applicant was represented by another firm of advocates. This court notes that in his application dated 21.8.24 the applicant in prayer 2 sought leave to be allowed to come on record for the appellant perhaps to cure that anomaly. The application has not been canvassed and I note from the record that the counsel for the applicant has not filed notice of appointment or change. Be that as it may, this court is inclined to determine this matter on the merits rather than on a technicality.

30. This court upon evaluation of the grounds set out does not find that the applicant meets the test for recusal as illustrated above. The allegations made by the applicant regarding fears that this court may not be impartial are unfounded as I have found out above. I also find the allegations of "collusion" scandalous, unfair to this court and are made without any basis whatsoever. It is made in bad faith because this court did not conduct the trial or delivered the judgment being appealed from in this appeal.

    In the premises, the application dated 13.9.24 lacks merit and is dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT KITUI THIS 16TH DAY OF OCTOBER, 2024

HON. JUSTICE R. K. LIMO

JUDGE