



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT
AT NAIROBI
ELC CIVIL SUIT NO. 282 OF 2011

THOMAS NYANGERI MOGAKA.....PLAINTIFF

VERSUS

ROSELYN DOLA OUKO

AARON TAFARI OUKO

(Being sued as personal representatives and administrators of the Estate of

JASON ATINDA OUKO.....DEFENDANTS

RULING

Introduction

There is an oral application before me for recusal in this matter. The Advocate for the Plaintiff Mr Mose Nyambega has referred to the good relationship between himself and the family at home and noted that it would be good if the matter is placed before another Judge. He further noted that the reason for making the application for recusal is that certain perception may ensue as the matter proceeds. He further submitted that whereas he has no personal interest in the matter, it will be useful if the matter is placed before another court. His client is aware of the relationship and he is likely to join in the discomfort.

Deane J. in his dissent in the Australian case of **Webb v. The Queen. [1994] 181 CLR 41** identified four areas of conflict of interest, bias or prejudice that may lead to disqualification and recusal of a judge, namely:

- (a) disqualification by interest, where some direct or indirect interest in the proceedings, pecuniary or otherwise, gives rise to a reasonable apprehension of prejudice, partiality or prejudgment;
- (b) disqualification by conduct which consists of cases in which conduct, either in the course of, or outside, the proceedings, gives rise to such an apprehension of bias including published statements;
- (c) disqualification by association consists of cases where the apprehension of prejudgment or other bias results from some direct or indirect relationship, experience or contact with a person or persons interested in, or otherwise involved in, the proceedings; and
- (d) disqualification by extraneous information which consists of cases where knowledge of some prejudicial but inadmissible fact or circumstance gives rise to the apprehension of bias.

The first category of disqualification identified by Deane J. results in actual bias, while the rest of the disqualifications result in apparent bias. The test for recusal differs between the two types of bias. In the case of actual bias, disqualification and recusal is automatic, without there being any "question of investigating, from an objective point of view, whether there was any real likelihood of bias, or any reasonable suspicion of bias, on the facts of the particular case" as stated by Lord Goff in the English case of **R. v. Gough (1993) 2 All E.R. 724**. In the case of apparent bias, the perception of impartiality is measured by the standard of a reasonable observer, and the English House of Lords in **Magill v. Porter (2002) 2 AC 357**, stated that the test for recusal is whether "a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased".

This test has been adopted by the Kenyan Courts. The Supreme Court of Kenya restated the law on recusal of a judge on the ground of bias in **Robert Tom Martins Kibisu vs Republic (supra)**, as follows:

“[59] We agree that bias is prima facie a factor that may lead to a judge recusing himself from a matter. Such an action is meant to safeguard the sanctity of the judicial process in tandem with the principle of natural justice that no man should be a judge in his own case and that one should be tried and/or have his dispute determined by an impartial tribunal. This is what is provided for in Article 50(1) of the Constitution thus:

“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”.

[60] What is bias? The Oxford English Dictionary defines bias thus: “as an inclination or prejudice for or against one thing or person”. The Blacks’ Law Dictionary 9th edition defines the word bias as “Inclination; prejudice; predilection”. Hence, as one of the fundamental tenets of the Rule of Law is impartiality of the judiciary, in circumstances where bias is alleged and proved, then the pragmatic practice is that the particular judge or magistrate will as a matter of course recuse/remove himself from the hearing and determination of the matter.

[61] From the onset, it is worth noting that when interrogating a case of bias, the test is that of a reasonable person and not the mindset of the judge. That is why in *Tumaini v. Republic* [1972] EA LR 441 Mwakasendo J held that “in considering the possibility of bias, it is not the mind of the Judge which is considered but the impression given to reasonable people...”

Jennifer K. Robbennolt & Matthew Taksin, observed in their book **Can judges Determine Their Own Impartiality?**, 41 *MONITOR ON PSYCHOLOGY* 24,24 (2010) That A major roadblock in seeking a more effective recusal process is the human tendency to see oneself as unbiased and able to disregard any improper influence. Disqualification motions suggest an actual or perceived lack of impartiality, when judges want to believe that they can be fair and objective: "*People believe they are objective, . . . see themselves as more ethical and fair than others, . . . and experience a "bias blind spot," the tendency to see bias in others but not in themselves These tendencies make it difficult for judges to identify their own biases.*" One of the recurring problems in judicial disqualification is that a judge's belief in her own impartiality misses the point. "

I note that public confidence in the judiciary does not result from the judiciary's perception of impartiality; it results from the public's perception of impartiality. Thus, a judge's belief that she is not biased is of little consequence to a recusal determination. The recusal standard is based on promoting public confidence in the judiciary and, by its terms, extends to an "appearance" of impropriety, even in circumstances where there is no actual impropriety.

From the foregoing therefore, the single issue for determination is whether the Plaintiff's counsel has furnished sufficient cause for the transfer sought. As already stated above, the change of venue should be granted as determined from the perspective of a reasonable man and not that of the mind of the judge. Whereas I see no bias on my part as the Judge but from the perspective of a reasonable man and given the circumstances of the Plaintiff and his advocate then it is only proper that this matter is heard by another Judge in Milimani.

In the circumstances, I allow the oral application and order the transfer of the Case Civil Suit No 282 of 2011 from this court to any other ELC Court at Milimani Law Courts. The file will be placed before the PJ for mention on 16/11/2021

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF NOVEMBER 2021.

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MOGENI J

JUDGE

IN THE PRESENCE OF: -

MR NYAMBEGA.....FOR THE APPLICANT

MS. MUKOYE FOR THE RESPONDENT

MR. V. OWUOR- COURT ASSISTANT