



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

CONSTITUTIONAL PETITION NO. 38 OF 2019

MIKE SONKO MBUVI GIDION KIOKOPETITIONER/APPLICANT

V E R S U S

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

INSPECTOR GENERAL OF THE

NATIONAL POLICE SERVICE.....2ND RESPONDENT

ANTI CORRUPTION AND ETHICS COMMISSION 3RD RESPONDENT

THE HON. ATTORNEY GENERAL 4TH RESPONDENT

THE SPEAKER, NAIROBI CITY COUNTY ASSEMBLY... 5TH RESPONDENT

THE CHIEF MAGISTRATE,

NAIROBI ANTI-CORRUPTION COURT

HON. D. N. OGOTI6TH RESPONDENT

AND

COUNCIL OF GOVERNORS 1ST INTERESTED PARTY

THE LAW SOCIETY OF KENYA 2ND INTERESTED PARTY

THE SENATE OF KENYA 3RD INTERESTED PARTY

RULING

factual Background

1. By a Petition dated 17th December 2019 and filed the same day pursuant to Articles 19, 20, 27(1), 165(4), 157 (2) and 249 of the Constitution, the petitioner sought several reliefs among them; a declaration that his arrest and subsequent arraignment before the Anti-Corruption Court to face prosecution over corruption related charges is unconstitutional, abuse of power and the court process by the respondents hence orders to quash the decision to charge him and prohibition of further criminal proceedings.

2. Contemporaneously filed with the Petition is a Notice of Motion seeking conservatory orders. On 18th December 2019, the petitioner filed a Notice of Motion of even date expressed to have been filed under Article 25(c) and 51(1) (a) of the Constitution, Section 5(1) of the Public Officers Ethics Act and Rules 3, (8) (a) and 5 of the Judicial Service Code of Conduct and Ethics and, the Public Officers Ethics Act, Cap 183 seeking orders as hereunder;

(1) That this matter be heard ex parte in the first instance and service upon the Respondents and the Interested Parties be dispensed with in the first instance.

(2) The Honourable Lady Justice Mumbi Ngugi do recuse herself from hearing, participating in any bench constituted to hear the matters herein, or deciding any aspect of these proceedings.

(3) The Honourable Lady Justice Ngenye do recuse herself from hearing, participating in any Bench constituted to hear the matters herein, or deciding any aspect of these proceedings.

(4) The Honourable Justice Onyiego do recuse himself from hearing, participating in any Bench constituted to hear the matters herein, or deciding any aspect of these proceedings.

(5) Upon the issuance of Order Number 2, 3, AND 4 above, the matter be forthwith, and expeditiously mentioned before the Principal Judge of the High Court of Kenya at Nairobi, or in the absence of the said Principal Judge, the duty Judge of the Constitutional and Human Rights Division at Nairobi, and in the absence of the said Judge, His Lordship the Honourable the Chief Justice of Kenya for further orders on the hearing of the Petitioner's pending application and the Petition.

(6) The costs of this application be in the cause.

3. The application is predicated upon grounds set out on the face of it and an affidavit sworn on 18th December 2019 by the Petitioner. It seeks recusal of Honourable Judges Mumbi Ngugi, Grace Macharia Ngenye and myself based on various grounds.

4. Regarding the prayer for Judge Mumbi's recusal, the applicant claimed that she had heard and determined a petition between **Moses Kasaine Lenolkul v Director of Public Prosecutions (2019)eKLR** in which she pronounced herself negatively on the application of Section 62(6) of the Anti-Corruption and Economic Crimes Act thereby upholding the Magistrate's Court's order barring the said Lenolkul Governor Samburu County from accessing his office during the pendency of his criminal proceedings before the Anti-Corruption court.

5. That similar court orders barring the petitioner (Governor of Nairobi) from accessing his office while his criminal proceedings were pending before the magistrate's court is an issue being challenged in this petition.

6. That Judge Mumbi having made a decision upholding the Magistrate's order in a similar scenario against Lenolkul, is likely to be influenced by the said decision hence apply the same reasoning in this case. That it is necessary that an independent mind does handle the petition herein so as to test different jurisprudence.

7. On similar grounds, Judge Ngenye's recusal was also sought. Regarding Judge Ngenye's case, it was alleged that while presiding over the Revision Application in the case of **Fredrick Ndungu Waititu Babayao and 12 others v Republic (2019)eKLR** she also upheld the lower court orders barring Waititu from accessing his office during the pendency of his criminal proceedings before the Anti-Corruption Court. That Judge Ngenye relied on the decision of J. Mumbi in Moses Kasaine case to make similar interpretation of Section 62(6) of ACECA.

8. Regarding my recusal, the applicant claimed that I am handling **High Court ACEC Petition No. 34 of 2019** lodged by the petitioner against the 1st to the 4th respondents named in this petition. He stated that it is not unreasonable to anticipate that it would be prejudicial to the applicant to be subjected to double jeopardy as the two petitions are now pending.

9. He further averred that, in spite of having raised weighty constitutional issues against the respondents, and the petition having been slated for hearing on 9th December 2019, it has become moot as it was the very same 9th December 2019 that the petitioner was arrested and arraigned before the 6th Respondent to answer to criminal charges.

10. That he views the dithering of the intervention of the court in **HC Petition No. 34/2019** as an expression of bias against him, and that he stands prejudiced if this matter were to be heard by this court.

11. Based on the above grounds, the applicant was of the view that, the three Judges had displayed lack of impartiality which is in total breach of Rule 3 Sub-Rule 5 of the Judicial Service Code of Conduct hence the need for an independent Judge to hear the same. That the applicant is reasonably apprehensive that he will not find justice before any of the three Judges and therefore their recusal for justice to be seen to be done.

12. In response to the application, the 3rd respondent (EACC) filed grounds of opposition dated 19th December 2019 stating as follows;

(i) that the applicant is engaging in forum shopping;

(ii) that J. Ngenye and Mumbi were exercising their core constitutional mandate;

(iii) that a decision made in one case does not automatically affect the outcome of another even if related;

(iv) that Judicial Officers should not disqualify themselves merely on grounds that they are handling another case involving one of the litigants; and

(v) that the allegations of bias and that the petitioner will not get justice is not backed with any evidence of likely bias hence

calculated to attract sympathy.

13. On their part, the 1st Respondent (DPP) filed their response by way of a replying affidavit sworn on 12th February 2020 by Judy Thuguri. She averred that the issues raised against J. N. Onyiego J were speculative as ACEC Petition No. 34/2019 is pending hearing and determination hence there is no prejudice as no decision has been made and therefore the issue of double jeopardy does not arise.

14. She contended that the applicant is the author of his own misfortunes since he has filed numerous pleadings and applications with different teams of advocates who seem to be working at cross purposes and therefore purport to seek the recusal of Judges.

15. She further stated that the application is unwarranted, unreasonable and an abuse of the court process as there is no damage, prejudice or bias likely to arise by any of the three Judges hearing the petition.

16. Regarding recusal by Judges Mumbi and Ngenye, she averred that their decisions were upheld by the Court of Appeal in Criminal Appeal No. 109/19 between Moses Kasaine Lenolkulal v DPP and Civil Appeal No. 416 of 2019 Ferdinand N. Waititu Baba Yao v DPP thus vindicating their reasoning.

17. Before the hearing of this application could commence, Justice Mumbi Ngugi recused herself on 1st January 2020 for the sole reason that she did not want to waste judicial time. Equally, Judge Ngenye recused herself on 12th May 2020 on grounds that she does not sit in the Anti-Corruption Division hence directed the matter to be mentioned before me to handle the issue of recusal on my part.

18. When the matter came before me on 13th May, 2020 I made directions for parties to file their submissions in disposition of the instant application and then fixed mention for 23rd May 2020 to confirm compliance. By 27th May 2020, none of the parties had complied. Consequently, the matter was fixed for virtual hearing on 19th June 2020.

Applicant's Submissions

19. In support of his application, Mr. Kinyanjui appearing for the applicant/petitioner relied on his submissions filed on 27th December 2019. Basically, learned counsel reiterated the averments and or grounds stated in the body of the Notice of Motion. Counsel underscored the importance of recusal as espoused in the Bangalore principles in particular principle No. 52 which underpins impartiality of judicial officers based on the standards of reasonable and objective person.

20. Referring to several authorities, Mr. Harisson Kinyanjui submitted that recusal of a Judge serves a higher calling of maintaining purity and appearance of objectivity in judicial process and that justice should be seen to be done. In support of this proposition, Counsel relied on the decision in the case of Rishad Hamid Ahmed and Another v Independent Electoral and Boundaries Commission (2016)eKLR where the Judge in the course of recusing himself stated that, **It is the duty of a judicial officer to ensure that litigants have faith in the court determining the dispute between parties. The Judge went further to state that, even if the Judge will not be biased, such remote feeling by the litigant should be avoided by having the matter heard by a different judicial officer.**

21. Further reliance was placed on the decision in the case of Alliance Media Kenya Ltd v Monier 2000 Ltd and Njoroge Regeru HCCC No. 370 of 2007 where the court stated that;

“... It is of paramount importance to ensure that the confidence of the public is not eroded by the refusal of Judges to disqualify themselves when an application has been made.”

22. Further reference was made to the holding in the case of Jasbir Singh Rai and 3 Others v Tarlochan Singh Rai and 4 Others (2013)eKLR where the Supreme Court stated that, **“ the object view, in the recusal of a Judicial Officer is that justice as between the parties be uncompromised; that the due process of the 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”**.

23. Mr. Kinyanjui went further to submit that the Judicial Code of Conduct Rule 3 Sub-Rule 5 provides grounds for disqualification of a Judge in situations where a Judicial Officer's impartiality must reasonably be questioned.

24. Learned Counsel further submitted that in Petition No. 34/2019 this court did not give due consideration of the prayers therein thereby delaying the matter leading to the petitioner's brutal and inhumane arrest and subsequent prosecution. That the manner in which the court handled the matter leaves no doubt that it is likely to handle this petition the same way.

25. It was counsel's submission that the file should be placed before the Principal Judge for purposes of acting in tandem with Section 30(2) of the High Court (Organization and Administration) Act for further directions on who should hear the matter and then monitor compliance with the Judicial Code of Conduct.

26. Mr. Kinyanjui opined that, even if the court finds that there is no merit in the application, it can still recuse itself for the sake of maintaining the integrity of the court. In persuading the court to take that direction, counsel relied on the decision in the case of Gitobu Imanyara and 3 Others v Attorney General (2012)eKLR where the court held that:-

“Having considered the facts as presented by the petitioner and looking at the matters objectively, I do not think a reasonable person with knowledge of the facts of the case would conclude I would be biased. The application for my recusal lacks merit and is not well founded. However, I note that Hon. Imanyara feels strongly that I should not handle this matter

particularly given his history of suffering which is well known to Kenyans at large. This is his opportunity to vindicate his rights and I will not stand in his way. In the circumstances, I refer the matter to the Head of the Constitutional and Human Rights Division to assign the matter to another judge.”

27. Finally, Mr. Kinyanjui urged that the test for recusal is the view or perception of a reasonable man in the circumstance of this case. He however said that they are not alleging bias against the Judge.

1st Respondent’s Submissions

28. The first respondent filed his submissions on 15th June 2020 stating that, the applicant does not allege bias or conflict of interest on the part of the court hence the application falls short of the threshold required for recusal of a Judge. M/s Thuguri submitted that the claim that the Judge did not dispense with Petition No.34 of 2019 with speed does not mean lack of impartiality.

3rd respondent’s submissions

29. On their part, Mr. Wambugu submitted orally opposing the application. He stated that the allegation of delay of a matter does not at all warrant recusal of a judge. That in any event, it is the petitioner who is responsible for the delay in petition no.34 of 2019.

Analysis and determination

30. I have considered the application herein, responses thereto and submissions by counsel. This court is being asked to recuse itself from hearing this matter on grounds, firstly; that I am in conduct of Petition No. 34 of 2019 to which the petitioner herein is also a petitioner; that I delayed the hearing of that petition in which the petitioner was seeking anticipatory bail among other reliefs leading to his alleged eventual brutal arrest and arraignment in court.

31. What constitutes recusal in legal parlance? Under what circumstances can a Judge or Magistrate recuse himself or herself from hearing a case? The word recusal is defined under the Black Law Dictionary as;

“Removal of oneself as Judge or policy-maker in a particular matter because of a conflict of interest.”

32. Pronouncing itself on what constitutes recusal of a judge, the Supreme Court in the case of **Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai and 4 Others (supra)** held that 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 participation of the Judicial Officer is called for. Their Lordships went further to state that;

“... 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.”

33. Similar position was held in a persuasive authority in the case of **South Africa Defence Force and Others v. Monning and Others (1992)(3)SA 482(A)** wherein the test for a party seeking recusal of a Judicial Officer was stated as follows:-

“the test for establishing a Judge’s impartiality is the perception of a reasonable person, this being a “well-informed, thoughtful observer who understands all the facts”, and who has “examined the record and the law”; and thus, “unsubstantiated suspicion of personal bias or prejudice” will not suffice.”

34. Further, in **Republic v. Jane Muthoni Mucheru and Another (2011)eKLR** the judge while faced with an application to recuse himself on grounds that he had made a ruling in a related matter denying the applicant bail dismissed that ground saying, his impartiality and mind was open to determine the case based on the facts and the law at hand and not what happened in the other case.

35. From the above quoted case law, the act of recusal is not a matter of course but a decision based on a factual foundation and personal conscience. It is meant and intended to build and promote integrity and bestow confidence to the public or litigants in the legal or judicial process. Where impartiality of a court is in doubt even in the remotest sense, the honourable thing for that court to do is to step down and have another Judge deal with the matter.

36. It is in the spirit of building confidence in the judicial process and the integrity of its decisions that the Judiciary came up with the Judicial Service (Code of Conduct and Ethics) Regulations 2020 dated 26th May 2020 vide Gazette Notice No. 102.

37. At 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.

38. To concretize the significance of recusal proceedings, principle 52 of the Bangalore Principles to which Kenya is a signatory underpins the importance of impartiality of a Judge in the course of conducting proceedings.

39. Regulation 9 of the Judiciary Code of Conduct aforesaid also 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.”

40. In the instant case, the applicant does not allege bias or conflict of interest. They are only accusing this court of having handled **Petition No. 34/2019** in a manner that did not please them. In petition No. 34/2019 the Petitioner sought orders declaring the pending investigations against him relating to corruption charges as unconstitutional and therefore sought orders stopping such investigations. Further, the petitioner sought orders granting him anticipatory bail pending his arrest.

41. Contrary to the petitioner's expectation, the court did not find it prudent to issue conservatory exparte orders or anticipatory bail at that stage. Instead, the court directed service of the application seeking conservatory orders and Anticipatory Bail. The said application was then fixed for interpartes hearing. Meanwhile, there was another suit filed by a proxy by the name of a Kinyanjui being Judicial Review No. 35/2019 seeking almost similar orders on behalf of the petitioner herein who was named as the Interested Party.

42. When the interpartes hearing for the application came up in **Petition No. 34/2019** both counsel made numerous Preliminary Objections and counter applications thus delaying the hearing. During the pendency of interpartes hearing, the Petitioner was arrested and charged. All those proceedings took about two weeks a period which by all standards cannot be viewed or perceived to be unreasonable delay to warrant this court's recusal. My only sin was failure to grant exparte anticipatory bail to stop arrest and arraignment of the Petitioner before the Magistrate's Court to face corruption related charges.

43. Grant of anticipatory bail or conservatory orders is a matter of discretion by the trial court depending on circumstances of each case. Failure to exercise discretion in favour of one party is not a ground to disqualify oneself. Courts are impartial Arbiters. Litigants should not expect decisions to go their way always and if not, a court is deemed to be biased or partial.

44. I do not see any delay occasioned by the court in **Petition No. 34/2019** which in any event is pending formal withdrawal pursuant to the letter of withdrawal written by the petitioner on his own volition. It is true as stated by the applicant **Petition No. 34/2019** was moot as at the time this petition was filed because the purpose for which it was filed was spent. Therefore, there is nothing pending for me to hear and hence no likelihood of double jeopardy.

45. To demand my recusal and that of Judge Mumbi Ngugi being the only judges mandated to hear Ant-Corruption related matters in the High Court is to say the least an act of forum shopping. The applicant has not met the key ingredients for my recusal as stipulated above in the Judicial Code of Conduct and the test set out in various judicial precedents.

46. A reasonable man faced with a set of facts presented before this court cannot find an iota of evidence or reasons to warrant my recusal. Instead, such reasonable ordinary person will read malice, a litigant hell bent to arm twist courts, and an abuse of the court process.

47. The above notwithstanding, a court confronted with unsubstantiated and unproven grounds for its recusal just as in this case, has the discretion for the sake of personal conscience to recuse itself and for the sole reason that, a party who might lose a suit at the end of the trial should not hold the excuse that he had foreseen bias coming hence justify to the public that our courts cannot be relied on to make impartial decisions.

48. For the sake of safeguarding the integrity of the Judiciary even without good reason, I will recuse myself from this matter. Secondly, having determined **Judicial Review No. 35/2019** and dismissed the prayers thereof which are technically related with this case, one might think that I will take similar approach in this petition hence the unfounded fear in this application. It is only fair that I avoid unnecessary clamor for justice even where there is no injustice committed by the court.

49. Having recused myself together with J. Mumbi and considering that there are only two (2) Judges in the Anti-Corruption Division, I will direct that the file be placed before the Principal Judge for further directions after consultation with the Chief Justice.

Order accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF JULY 2020.

J. N. ONYIEGO

JUDGE